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ARTICLE

America's Hidden Foster Care System

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Abstract. In most states, child protection agencies induce parents to transfer physical custody of their children to kinship caregivers by threatening to place the children in foster care and bring them to family court. Both the frequency of these actions (this Article establishes that they occur tens or even hundreds of thousands of times annually) and their impact (they separate parents and children, sometimes permanently) resemble the formal foster care system. But they are hidden from courts, because agencies file no petition alleging abuse or neglect, and hidden from policymakers, because agencies do not generally report these cases.

While informal custody changes can sometimes serve children's and families' interests by preventing the need for state legal custody, this hidden foster care system raises multiple concerns, presciently raised in Supreme Court dicta in 1979 in *Miller v. Youakim*. State agencies infringe on parents' and children's fundamental right to family integrity with few meaningful due process checks. Agencies avoid legal requirements to make reasonable efforts to reunify parents and children, licensing requirements intended to ensure that kinship placements are safe, and requirements to provide foster care maintenance payments to kinship caregivers.

This Article explains how the present child protection funding system and recent federal financing reforms further incentivize hidden foster care without regulating it. Moreover, relatively recent state statutes and policies codify the practice without providing much regulation. In contrast to this trend, this Article argues for regulation: the opportunity for a parent to challenge the need for the custody change in court, limits on the length of time such custody changes can remain in effect without more formal action, the provision of counsel to parents (using money made available by a separate recent change in federal child protection funding), and requirements for states to report cases in which their actions lead to parent-child separations.

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Introduction

The state child protective services (CPS) agency receives a call alleging that a parent has abused or neglected a child. The CPS agency[1] investigates and concludes that the parent has, in fact, abused or neglected the child, and further determines that the child is in such danger in the parent's custody that the child needs to live elsewhere immediately. Accordingly, the agency identifies kin who can take care of the child—the child's grandparent, aunt or uncle, or godparent—and acts to ensure the child lives with that person, at least temporarily.

At this point, one might expect the CPS agency to involve a state family court. The state is limiting one of the most precious substantive liberty rights recognized by the Constitution—that of parents to the care, custody, and control of their children—and the reciprocal right of children to live with their parents. Balancing that fundamental right to family integrity with the state's *parens patriae* power to protect children from abuse and neglect is the subject of a complex body of federal and state constitutional and statutory law requiring court hearings focused on parental fitness and child safety.[2]

Yet in states across the country, this process happens without court involvement or oversight.[3] Instead, the agency threatens to remove children and take parents to court, a process that could lead to an indefinite placement of children in foster care, and even termination of parental rights, unless the parents agree to change their children's physical custody to the identified kinship caregiver. The state thus effectuates the children's loss of their parents' care and the parents' loss of physical custody of their children without any other branch of government checking or balancing the agency's actions and without anyone getting a lawyer. It is as if a police department investigated a crime, concluded an individual was guilty, did not file charges or provide him with an attorney, and told him he had to agree to go to jail for several weeks or months, or else it would bring him to court and things could get even worse.

Available data shows the practice occurs with great frequency.[4] States do not track the number of these cases precisely (a problem on its own), but this Article combines a variety of empirical studies and state-specific documentation to demonstrate that these cases likely separate tens or hundreds of thousands of children from their parents annually,[5] often for significant periods of time and

1. These agencies have different names in different jurisdictions—for instance, departments of social services, children's services, child and family services, etc. For simplicity, I refer to "CPS agencies" throughout this Article.

2. *See infra* notes 103-07 and accompanying text.

3. *See infra* Part I.A.

4. *See infra* Part I.B.

5. *See infra* Part I.B.

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sometimes permanently.[6] It is thus a practice on par with formal foster care—in both the number of families affected and the impact on those families.

This is America's hidden foster care system.[7] It is a legally undomesticated[8] process through which state agencies effectuate a change of custody for thousands of children with little, if any, meaningful due process. State agencies thus coerce a surrender of fundamental constitutional rights with no lawyers or legal checks. This action, and what happens to the children and families subsequent to this action, is hidden from courts because agencies file no petition alleging abuse or neglect. It is hidden from the public, the federal government, and policymakers because federal funding statutes do not require states to count or report cases in which they arrange for hidden foster care.

Hidden foster care raises multiple concerns. The first and most obvious is whether threatening to remove children if parents do not place them with kinship caregivers renders such placements involuntary, thus violating due process. Substantively, this lack of oversight of agency determinations that children must be separated from their parents risks unnecessary and harmful separations. Given CPS agencies' wide discretion, the limited information often available at the beginning of a case, and the need to make quick decisions, it is easy to imagine many errors occurring, especially without court oversight.

Second, the hidden foster care system undermines important legal protections for children, parents, and kinship caregivers. By avoiding formal foster care, agencies avoid court oversight of their actions and legal requirements to develop case plans and make reasonable efforts to reunify parents and children.[9] They avoid foster care's licensing requirements, which are intended to ensure kinship placements are safe, thus potentially leaving some children in dangerous situations.[10] They avoid requirements to provide foster care maintenance payments to kinship caregivers, thus leaving caregivers without the financial support available to formal foster parents and jeopardizing their ability to take care of children.[11]

6. *See infra* Part I.A.3.

7. Others have used similar phrases. *See, e.g.*, DIANE L. REDLEAF, THEY TOOK THE KIDS LAST NIGHT: HOW THE CHILD PROTECTION SYSTEM PUTS FAMILIES AT RISK 191 (2018) ("shadow foster care"); Andrew Brown, *Shadow Removals: How Safety Plans Allow CPS to Avoid Judicial Oversight*, HILL (May 31, 2019, 9:30 AM EDT), https://perma.cc/TV5F-UDHV ("shadow removals").

8. This phrase is taken from the pathbreaking Supreme Court case *In re Gault*, 387 U.S. 1, 22 (1967), which favored the "constitutional domestication" of delinquency cases. In *Gault*, "domestication" meant the imposition of basic procedural rights for defendants, including the provision of counsel, in delinquency cases. *See id.* at 27-29.

9. *See infra* Parts III.B.1-.2.

10. *See infra* Part III.B.4.

11. *See infra* Part III.B.3.

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The Supreme Court brought together these sets of concerns in its 1979 opinion in *Miller v. Youakim*, which presciently worried that permitting states to provide kinship foster parents less financial support would allow states to remove children from their parents without triggering the judicial checks that formal foster care and its financial payments require.[12] Hidden foster care shows how the Court's concerns have been borne out.

Despite these concerns, informal changes in children's physical custody can sometimes be useful—allowing children to live at home with kin and limiting state control over their families.[13] Parents may sometimes benefit from avoiding the court process, which introduces a judge who might believe a more invasive intervention is required. Hidden foster care leaves children in parents' legal custody, while court cases could lead a judge to shift legal custody to the CPS agency. Even if a brief separation from parents is necessary, it may be in children's interest to avoid family court intervention that could cause a separation from all family members, even the kinship caregiver. Kinship caregivers may prefer informal physical custody of children to a process that may require CPS agencies to decide whether to grant them a foster care license and that subjects the kinship caregiver to agency oversight.

This Article's concern is that absent legal regulation, the status quo gives CPS agencies tremendous power to determine the unusual case in which hidden foster care is appropriate. Given the weighty stakes involved and the state power exercised, more procedural protections should be required.

The hidden foster care phenomenon, and critiques of it, are not new. Indeed, it has been criticized from multiple ends of the child protection law spectrum, both by those who want to limit state intervention in families (who worry about the state effectively changing custody without due process)[14] and by those who want the state to intervene in more families (who worry that hidden foster care leaves children in unsafe conditions).[15]

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12. *See* Miller v. Youakim, 440 U.S. 125, 139-40 (1979); *see also infra* text accompanying notes 271-72. The Court prevented states from paying formal kinship foster caregivers less than other foster parents—the correct result, which nonetheless strengthened financial incentives for states to use hidden foster care. *See infra* Part IV.B.

13. *See* ANNIE E. CASEY FOUND., THE KINSHIP DIVERSION DEBATE: POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES AND CHILD WELFARE AGENCIES 1-2 (2013), https://perma.cc/5GBW-WLEA (summarizing arguments for and against hidden foster care).

14. *See, e.g.*, Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 836-37 (1998) (arguing that safety plans are unconstitutionally coercive); Ryan C.F. Shellady, Note, *Martinis, Manhattans, and Maltreatment Investigations: When Safety Plans Are a False Choice and What Procedural Protections Parents Are Due*, 104 IOWA L. REV. 1613, 1616-17 (2019) (same).

15. *See, e.g.*, Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV.

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Hidden foster care requires renewed attention because, as this Article establishes, a growing set of recent federal and state statutes and policies institutionalize and incentivize the practice without imposing meaningful regulations. This Article is the first to explain how the present child protection funding system creates incentives for states to avoid formal foster care and, just as importantly, how recent (and otherwise positive) federal financing reforms risk further institutionalization of hidden foster care without regulating it. Moreover, relatively recent state statutes and policies codify the practice without providing much regulation. Rather than add essential substantive limits and procedural protections to ensure safety plans that respect the rights of affected parents, children, and kinship caregivers, state policies formalize hidden foster care without addressing its core problems.

This Article argues for the legal domestication of what is now hidden foster care. First, using state power to change child custody should trigger strong legal protections for family integrity—including the opportunity for a parent to challenge the need for the custody change in court and limits on the length of time such custody changes can remain in effect without more formal action. Second, any change in physical custody requested by the state should trigger a right for parents to obtain legal counsel (appointed if necessary) to advise them on their rights and negotiate appropriate plans with CPS agencies. New federal financing guidance makes federal funding available to states to provide attorneys to parents in precisely these cases. These steps recognize that hidden foster care is sometimes appropriate and therefore would not require CPS agencies to bring families to court whenever they use hidden foster care. But they would ensure that parents have a means to protect both their own and their children's right to family integrity.

Third, the federal government should take this parallel system of foster care out of hiding by requiring states to track the number of cases in which their actions lead to parent-child separations without formal foster care and what happens to affected children and their families. Presently, the absence of clear data on the frequency of hidden foster care's use, duration, effects on the safety of children, and other impacts on children and families limits policy discussions regarding the practice. Given the prominence of hidden foster care and the severity of its infringement on family integrity, gathering basic data regarding hidden foster care is essential to the future development and evaluation of policies governing this practice.

Part I of this Article defines the practice of hidden foster care and provides descriptive evidence of its incredibly wide scope, analogous to that of the formal foster care system. Part II addresses the due process concerns with the

1323, 1366-67 (2012) (expressing concern that safety plans left children with unsafe caregivers).

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practice, including a discussion of competing U.S. Circuit Court of Appeals cases regarding the voluntariness of hidden foster care. Part III explains the policy concerns and policy benefits of the practice. Part IV describes the perverse incentives to use hidden foster care created by federal child protection funding laws. Part V describes how recent federal and state statutes and state agency policies institutionalize the practice of hidden foster care without adequately regulating the practice. And Part VI offers a range of individual case and systemic administrative oversight steps that would provide long-overdue legal regulation to this practice.

I. Hidden Foster Care: Similar in Function and Scope to Formal Foster Care

Every year, CPS agencies nationally separate more than 250,000 children from their parents and place them in formal foster care in the state's legal custody under the oversight of a family court judge.[16] Some are placed with strangers, and a growing proportion of foster children—now about one-third—is placed with kinship caregivers.[17] Some of these children leave foster care within weeks or months, largely to reunify with their parents, but others have their custody permanently changed. The hidden foster care system separates a roughly similar number of children, many of whom reunify with and some of whom are separated permanently from their parents.[18] A key difference is that in formal foster care, CPS agencies take legal custody of children, while in hidden foster care they induce parents to transfer physical custody to kinship caregivers through threats of the state taking legal and physical custody. This supposed voluntariness exempts hidden foster care from both court oversight and federal data-tracking requirements (which means a precise count of the number of hidden foster care cases is impossible).

This Part describes generally what hidden foster care is, how it operates, its impact on children, and its context in relation to kinship foster care.[19] This Part also uses available data to show the wide scope of the hidden foster care

16. This is the number of children counted as having "entered foster care" in a given year. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018—NO. 25, at 1 (2018), https://perma.cc/5HNA-6JMM.

17. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 2017, at 4 (2019), https://perma.cc/J4QR-839P.

18. *See infra* Parts I.A.2-.3, .B.

19. The practice varies in some details from state to state, though a complete breakdown of such differences is beyond this Article's scope.

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system, which affects at least tens or even hundreds of thousands of children each year, placing it on par with the formal foster care system.[20]

A. Hidden Foster Care

Hidden foster care occurs when CPS agencies cause a change in a child's physical custody without any family court action, without placing the child in the agency's own custody, and without reporting the child's removal to the federal government. It follows the same sort of concerns about child safety that trigger formal foster care—such as concerns about a parent's drug abuse or mental health condition that limits their ability to parent a child, physical or sexual abuse of a child by a parent or other adult, or an unsanitary house. CPS agencies effectuate hidden foster care via "safety plans"[21]—agreements between CPS authorities and parents intended to keep children safe. Safety plans have a particular meaning in this context. The social work literature defines a safety plan as "a plan that is developed by the parent, worker, children (depending upon their age), and [safety] network members to ensure the safety of their children."[22] Safety plans have their roots in social work practice involving domestic violence, where social workers seek to empower family members to design plans intended to keep them safe while taking into account all of their individual circumstances.[23] Safety plans are intended to identify a "safety network"—individuals who can help keep adults and children safe as needed.[24] Crucially, safety plans leading to hidden foster care[25] follow a CPS agency's threat to remove children and/or initiate child protection proceedings in family court if parents refuse to change the child's custody as the CPS agency insists.

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20. *See infra* Part I.B.

21. The term "safety plan" can also refer to a plan developed after a CPS agency has removed the child directly or filed a petition. For instance, District of Columbia law refers to a "safety plan" that the CPS agency develops during the seventy-two hours between the removal of a child and a family court hearing. D.C. CODE § 16-2312(a)(1) (2019).

22. *E.g.*, Stephanie Nelson-Dusek et al., *Assessing the Value of Family Safety Networks in Child Protective Services: Early Findings from Minnesota*, 22 CHILD & FAM. SOC. WORK 1365, 1365 (2017).

23. *See id.* at 1365-66.

24. *See id.*

25. Safety plans need not lead to hidden foster care; they can, instead, require parents to comply with steps short of changes in children's custody. While important to child protection practice, such safety plans are beyond the scope of this Article. These safety plans present somewhat different legal and policy issues—they, for instance, do not introduce alternative caretakers and they infringe less on the right of family integrity. *See, e.g.*, *id.* at 1372 (describing safety plans that do not aim to change custody but rather aim to "identify specific people and strategies that support parents and act as safety monitors for the children").

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1. How it begins: Threats of deeper involvement

The social work goals of safety planning include "increas[ing] family engagement."[26] It bears analysis whether safety plans are truly voluntarily accepted by families and thus whether this goal is met. That analysis is essential when the social worker works for a CPS agency and has authority to remove children from parents' custody and initiate legal action to declare the parents unfit. As Part II will discuss, a central legal debate is whether these safety plans are voluntary agreements akin to any contract or civil settlement or whether a CPS threat to remove children renders such plans coercive.

While the debate over the implication of CPS agency threats remains open, there is no question that CPS does threaten to remove children immediately if parents do not agree to a safety plan that calls for children's physical custody to change, typically shifting the child to the custody of a kinship caregiver. CPS agency policies, safety plan forms, and caseworker reports all confirm that CPS induces agreements to safety plans through threats to remove children. Threats are sometimes stated explicitly on safety plan forms. A Kentucky safety plan form, for example, stated in all capital letters that "ABSENT EFFECTIVE PREVENTATIVE SERVICES" through the CPS agency's safety plan, "PLACEMENT IN FOSTER CARE IS THE PLANNED ARRANGEMENT FOR THIS CHILD."[27] The form used in South Carolina is similarly forceful, providing in bold type, "If the parent(s) refuse to sign a valid safety plan, an out of home placement must be sought by Law Enforcement or Ex parte Order to keep the child safe, pending the completion of the investigation."[28] Other states use somewhat subtler but similarly threatening language.[29] Such threats are confirmed by CPS agency policies, which make clear that agencies will seek the immediate removal of children if parents do not agree to a safety plan, and emphasize that this threat is essential to inducing compliance. One illustrative policy states that a safety plan

> is only effective if all parties agree to the plan and understand that [CPS] will consider the child unsafe if the parties do not comply with the agreed terms of the

26. *See id.* at 1365.

27. Schulkers v. Kammer, 367 F. Supp. 3d 626, 634 (E.D. Ky. 2019), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020).

28. S.C. Dep't of Soc. Servs., Safety Plan (Form 3087), at 2 (2012), https://perma.cc/3YPF-D3QG; *see also* Dupuy v. Samuels, 462 F. Supp. 2d 859, 868 (N.D. Ill. 2005) (noting that Illinois CPS officials used safety plan forms with boilerplate language stating that they could remove children if parents refused to agree to the safety plan), *aff'd*, 465 F.3d 757 (7th Cir. 2006).

29. *See, e.g.*, Smith v. Williams-Ash, 520 F.3d 596, 598 (6th Cir. 2008) (reporting Ohio's form language threatening that if parents "will not be able to continue following the plan, [CPS] may have to take other action(s) to keep your child(ren) safe").

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> plan and [that CPS] will initiate the legal action to protect the child through the removal of the child from the parent's custody and control.[30]

Threats are sometimes otherwise stated in communications between CPS authorities and parents—often with little nuance.[31] As one CPS worker told the Annie E. Casey Foundation, a major child welfare research and funding organization: "We say we want a child welfare system that values family decisions . . . , but once the government gets involved, relatives and parents don't always have real choices. Sometimes it's auntie or else."[32]

Even without explicit threats, the absence of court oversight of safety plans provides "opportunities for manipulation of the parents"[33] through implied threats or by CPS agencies' failure (intentional or not) to fully inform parents of their options. CPS agencies can, through form language and verbal threats, communicate that parents must agree to safety plans or else see the agency place their children in foster care, even when no plans to follow through on that threat exist.[34] The absence of court oversight also means that a CPS agency's precise words and actions taken to induce parental agreement to a safety plan can remain subject to dispute and unresolved.[35] Indeed, the absence of court oversight removes a strong incentive for CPS officials to be careful to avoid overly threatening language.

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30. S.C. DEP'T OF SOC. SERVS., HUMAN SERVICES POLICY AND PROCEDURE MANUAL: CHAPTER 7, CHILD PROTECTIVE AND PREVENTIVE SERVICES § 719.02 (2019), https://perma.cc/VG69-M958.

31. For instance, in *Smith*, the parents alleged that the CPS caseworker threatened that they could lose their children forever if they did not follow the safety plan. 520 F.3d at 598. In a case in South Carolina, a CPS agency lawyer wrote to a parent's attorney:

> If [the parent] chooses to violate the safety plan, we can seek a court action and a finding of physical abuse and central registry along with removing custody, if she wants to go that route OR she can continue to cooperate, and we can attempt to resolve this matter without court intervention.

Email from Emily Sordian, Managing Attorney, Orangeburg & Calhoun Ctys., to Skyler Hutto et al. (July 24, 2018, 9:21 AM), *reprinted in* Plaintiffs' Response to Motion to Dismiss, exhibit A, Adams v. S.C. Dep't of Soc. Servs., No. 2019-CP-38-00036 (S.C. Ct. Com. Pl. Apr. 12, 2019). In the interest of full disclosure, I was retained as an expert by the plaintiff in *Adams*.

32. ANNIE E. CASEY FOUND., *supra* note 13, at 1.

33. *See* Pearson, *supra* note 14, at 842.

34. *See, e.g.*, Schulkers v. Kammer, 367 F. Supp. 3d 626, 634 (E.D. Ky. 2019) (reciting threats from CPS agencies even though "[i]n truth, there was no planned arrangement for foster care"), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020).

35. Pearson, *supra* note 14, at 841-42. Pearson also cites to cases raising questions about the specific circumstances of safety plan agreements, such as one alleging that CPS staff made a parent sign a safety plan agreement that was partially blank, threatening to "tell the judge" if she did not. *See, e.g.*, *id.* at 841 & n.31 (quoting *In re* J.H., 480 So. 2d 680, 683 (Fla. Dist. Ct. App. 1985)).

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CPS agencies' role in inducing safety plans creates definitional challenges for scholars. Consider this distinction between private and public kinship care by leading scholar Dorothy Roberts: "As a matter of definition, private kinship care is arranged by families without child welfare agency involvement; kinship foster care, meanwhile, is provided to children who are in the legal custody of the state."[36] Hidden foster care not only follows CPS agency involvement, but is usually specifically requested by CPS authorities.[37] Still, legal custody does not transfer, and certainly does not transfer to the state, leaving parents, children, and kinship caregivers without a clear legal status governing the situation insisted upon by the CPS agency.[38]

Similarly, child protection agencies and policy leaders have struggled to precisely define CPS agencies' role in setting up hidden foster care. They often use language that avoids stating that CPS agencies direct the process, but nonetheless makes clear that CPS agencies have central, even decisive, roles. Consider, for instance, a 2016 white paper published by Child Trends, a leading child welfare think tank. It opens by using the passive voice to describe the phenomenon—"kinship diversion" occurs when "children *are placed with* relatives as an alternative to foster care"—avoiding the question of who precisely does the placing.[39] The federal Children's Bureau has similarly used the passive voice—"children who are known to the child welfare agency *are placed with* relatives without the State or Tribe assuming legal custody."[40] Meanwhile, by the next paragraph of its white paper, Child Trends moves on to an ambiguous verb—"a child welfare agency *facilitates* the placement of a child with relatives or fictive kin."[41] Deeper in, the white paper makes clear that when abuse or neglect is suspected, CPS agencies are "the primary influence in suggesting" a change in custody and seeking parental agreement.[42] The Children's Bureau chose a different, slightly less ambiguous verb—"the child welfare agency *arranges* for a placement without any court involvement."[43]

36. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623 (2001).

37. *See supra* notes 27-32 and accompanying text.

38. *See supra* text accompanying notes 16-18.

39. *See* KARIN MALM & TIFFANY ALLEN, CHILD TRENDS, PUB. NO. 2016-24, RESEARCH BRIEF: A QUALITATIVE RESEARCH STUDY OF KINSHIP DIVERSION PRACTICES 1 (2016) (emphasis added), https://perma.cc/2JM7-4KMK.

40. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., WORKING WITH KINSHIP CAREGIVERS 3 (2018) (emphasis added), https://perma.cc/B389-JZB7.

41. MALM & ALLEN, *supra* note 39, at 1. "Fictive kin" refers to individuals with family-like relationships that lack a relationship through blood or marriage. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., PLACEMENT OF CHILDREN WITH RELATIVES 2 (2018), https://perma.cc/MD86-CJGS.

42. *See* MALM & ALLEN, *supra* note 39, at 3.

43. CHILDREN'S BUREAU, *supra* note 40, at 3 (emphasis added).

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Multiple other scholars and think tanks emphasize state authorities' central role in making kinship diversion placements happen.[44] CPS caseworkers are "often" the ones to call potential caregivers and ask if they will take the child into their home.[45]

Safety plans are generally arranged without the provision of counsel to parents.[46] Parents therefore do not generally have a lawyer to consult about the validity of CPS threats to remove children, their likelihood of success in any court hearing, or the tactical advantages or disadvantages of cooperating temporarily with CPS officials. Moreover, parents lack a lawyer to help negotiate terms of any safety plan, such as duration, visitation, decisionmaking authority, or events that would trigger the plan's termination.

2. What it does: Changes physical custody

Through hidden foster care, CPS agencies effectuate changes in physical but not legal custody,[47] while in formal foster care a court order shifts legal custody from parents to a CPS agency. But hidden foster care effectuates the same day-to-day changes in children's reality—it changes the person with whom they live, often permanently. Family court judges can, of course, remove children from their parents' physical custody and place them in foster care, including kinship foster care.[48] Family courts can also allow children to remain in their own homes and order one or both parents to leave.[49] Both steps mirror what happens in hidden foster care. A safety plan could require the child to leave the home and move in with a kinship caregiver—with or without a parent present.[50] Or the child could remain in the home, but a parent whom CPS has concluded has maltreated the child would be required to leave.[51]

44. *See, e.g.*, ANNIE E. CASEY FOUND., *supra* note 13, at 1 (describing how "child welfare agencies rely" on kinship diversion and "direct[] children to live with willing relatives").

45. Gerard William Wallace & Eunju Lee, *Diversion and Kinship Care: A Collaborative Approach Between Child Welfare Services and NYS's Kinship Navigator*, 16 J. FAM. SOC. WORK 418, 422 (2013).

46. *See* Tara Grigg Garlinghouse & Scott Trowbridge, *Child Well-Being in Context*, 18 U. PA. J.L. & SOC. CHANGE 105, 117 (2015).

47. *See, e.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02. Legal custody refers to who holds decisionmaking authority regarding a child. *Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019). Physical custody refers to where the child lives. *Physical Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019).

48. *E.g.*, S.C. CODE ANN. § 63-7-1660 (2019).

49. *See, e.g.*, *In re* Blakeman, 926 N.W.2d 326, 328 (Mich. Ct. App. 2018) (describing a parent's appeal from a family court order removing him from the family home).

50. *See, e.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

51. *E.g.*, Croft v. Westmoreland Cty. Children & Youth Servs., 103 F.3d 1123, 1124-25 (3d Cir. 1997).

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The child could remain in the home, and a kinship caregiver could be required to move in.[52] These last two options could be combined, with one or both parents required to leave their child and their home *and* a kinship caregiver agreeing to move in and take physical custody of the child.[53] Through the most severe of these options—when parents leave their home without their children or when children move into a kinship caregiver's home without their parents—parents and children lose their right to live together. Even when parents and children can remain together, the required addition of another adult in the home gives that person significant power and diminishes the parents' authority over the child.[54]

Kinship care is not limited to hidden foster care and physical custody changes. In fact, kinship care is frequently used in the formal foster care system and has a strong research base in that context. While CPS agencies placed only about 18% of foster children in kinship homes in the mid-1980s, they dramatically increased their usage of kinship care later in the decade as the number of children those agencies removed increased sharply following concerns about increasing drug addiction (among other causes), and there was an increased desire to keep children in their own extended families and communities when possible.[55] Though kinship care initially began to fill an urgent need for more foster placements, a growing body of research showed significant benefits from kinship care.[56] Children are more likely to feel that they belong with kinship caregivers than in foster care with strangers,[57] can

52. *See, e.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

53. *See, e.g.*, REDLEAF, *supra* note 7, at 5, 22-24 (describing one such case and noting that this fact pattern is "routine" in Illinois).

54. Safety plans can also require parents to change a parenting practice without changing physical custody. For instance, in one well-publicized case, CPS authorities were concerned about ten- and six-year-old siblings walking home from a park alone and required the father to sign a safety plan agreeing not to leave his children unsupervised or else face the removal of his children. *See* David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 239 n.8 (2015) (describing the case and citing its media coverage).

55. *See* Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as a Child Welfare Resource*, *in* CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 405, 410-11 (Gerald P. Mallon & Peg McCartt Hess eds., 2005); *see also* Roberts, *supra* note 36, at 1624 ("An exploding foster care population combined with a shortage of licensed nonrelative foster homes made relatives an attractive placement option.").

56. For a recent summary of research findings on the benefits of kinship care, see Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD. LEGAL RTS. J. 101, 104-08 (2019).

57. *See* Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 SOC. WORK RES. 105, 115 (2008).

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more easily remain with their siblings,[58] have fewer behavioral problems and better mental health,[59] and are significantly less likely to have their initial placement disrupted or to experience multiple moves from one foster placement to another.[60] Some advocates also argue that kinship foster care is consistent with long traditions of extended family and fictive kinship care, especially among black families.[61] Kinship care rates have continued to grow in recent years; in 2017, about one-third of all children in formal foster care lived with a kinship caregiver, up from one-fourth in 2007.[62]

3. How long it lasts and how it ends

The length and long-term outcomes of hidden foster care are similar to those of the formal foster care system. Relatively little data demonstrates hidden foster care cases' duration or how they end, and significant variations between states are likely. One detailed review in Texas, however, reveals that in most cases, hidden foster care triggers a long-term if not permanent change in custody. In fiscal year 2014, Texas authorities used hidden foster care in 34,000 cases and reunified children and parents that same year in around 13,000 of those[63]—meaning that in more than 60% of hidden foster care cases in Texas, children remained with kinship caregivers. While CPS authorities brought some cases to court (about 4,000, or 12%), most of the remaining children lived with kinship caregivers without a formal change in custody or the court oversight that such a change would require.[64]

Safety plans last for inconsistent periods of time, and agency practice and policy do not always align. In South Carolina, for instance, a policy provides that safety plans may only be in place for ninety days.[65] But individual cases

58. CHILDREN'S BUREAU, *supra* note 40, at 4.

59. *See* Marc Winokur et al., *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment (Review)*, COCHRAN DATABASE SYSTEMATIC REVIEWS 19 (Jan. 31, 2014), https://perma.cc/A5AG-Y63Y.

60. *See, e.g.*, Eun Koh, *Permanency Outcomes of Children in Kinship and Non-Kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILD. & YOUTH SERVICES REV. 389, 390, 393, 396 (2010); Koh & Testa, *supra* note 57, at 112.

61. *See, e.g.*, Roberts, *supra* note 36, at 1621-22; Maria Scannapieco & Sondra Jackson, *Kinship Care: The African American Response to Family Preservation*, 41 SOC. WORK 190, 190-92 (1996).

62. CHILDREN'S BUREAU, *supra* note 17, at 4.

63. CHILDREN'S COMM'N, SUPREME COURT OF TEX., PARENTAL CHILD SAFETY PLACEMENTS 3, 13 (2015), https://perma.cc/5UVU-RC5J.

64. *See id.*

65. S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

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show the agency enforcing safety plans beyond ninety days.[66] Beyond South Carolina, a majority of state CPS agencies surveyed by Child Trends said they used hidden foster care, and a majority of those states reported that they "discontinue ongoing supervision with the caregiver and leave the caregiver as the physical custodian of the child."[67] That is, CPS agencies often cause (or, if one prefers, facilitate[68] or arrange[69]) a change in a child's physical custody and then end their involvement with the family without doing anything to change legal custody. Most agencies reported that they did not believe they were obligated in these cases to go to family court and seek an adjudication of neglect.[70]

Long-term (and certainly permanent) parent-child separations through hidden foster care resemble the most drastic consequences of formal foster care cases. Even when hidden foster care does not last long and children return to their parents' physical custody quickly, the system resembles the formal foster care system. Children who reunify within weeks or months follow a timeline that is normal in formal foster care cases: 9% of all children removed into foster care leave in less than one month, 24% leave in less than six months, and 43% leave in less than twelve months.[71]

B. Scope of Hidden Foster Care

There is no precise count or even estimate of hidden foster care cases. States generally do not track the number of children whose custody changes through safety plans, and certainly not in a consistent manner, preventing any precise and reliable national estimate.[72] This data gap exists because federal foster care reporting requirements do not require the collection of such data.

66. *E.g.*, Complaint ¶ 13, Adams v. S.C. Dep't of Soc. Servs., No. 2019-CP-38-00036 (S.C. Ct. Com. Pl. Jan. 6, 2019).

67. *See* TIFFANY ALLEN ET AL., CHILD TRENDS, STATE KINSHIP CARE POLICIES FOR CHILDREN THAT COME TO THE ATTENTION OF CHILD WELFARE AGENCIES: FINDINGS FROM THE 2007 CASEY KINSHIP FOSTER CARE POLICY SURVEY 12 (2008), https://perma.cc/R7RN-BUR9.

68. *See supra* text accompanying note 41.

69. *See supra* text accompanying note 43.

70. *See* ALLEN ET AL., *supra* note 67, at 13.

71. CHILDREN'S BUREAU, *supra* note 16, at 3 (providing data from fiscal year 2017).

72. *See, e.g.*, MALM & ALLEN, *supra* note 39, at 6 ("With no standardized policies and procedures for kinship diversion practice, and no data gathered to track children who have been diverted, agencies do not know exactly how [the] practice is carried out and how diverted families are being served."); Wallace & Lee, *supra* note 45, at 419 ("Many of these diversion placements are unlikely to be included in official child welfare databases. Therefore, the actual number of children placed with child welfare agency involvement is unknown . . . ." (citations omitted)).

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States must report data regarding all children in foster care,[73] and federal data reporting regulations apply only to children living in formal foster care.[74] Children in hidden foster care are simply not covered, so states need not track these cases.[75]

Despite this data gap, strong evidence suggests that the scope of the hidden foster care system is quite large; the number of children who pass through hidden foster care each year is roughly comparable with the number of children removed from their families, brought to court, and placed in formal foster care.

The few studies to offer specific estimates suggest that hundreds of thousands of children go through hidden foster care each year. A child welfare think tank studied several local jurisdictions and found that the ratio of hidden foster care to formal foster care cases ranged from 7:10 to roughly 1:1.[76] Those ratios are consistent with older estimates. Detailed data regarding 5,873 children with child protection cases in 2008 and 2009 in eighty-three counties across the country[77] revealed that nearly half of children who did not live at home following a CPS investigation lived in informal kinship care.[78] That is, when a CPS investigation leads to a child not living with a parent, about half of the

73. *See* 45 C.F.R. § 1355.40(b)(1) (2019). These requirements govern the Adoption and Foster Care Analysis and Reporting System (AFCARS). *See AFCARS*, CHILD. BUREAU, https://perma.cc/NGZ3-7WBW (archived Feb. 12, 2020) (describing the AFCARS data system).

74. 45 C.F.R. § 1355.42(a) (listing three circumstances that trigger reporting requirements, all of which are conditioned on CPS agencies having placement and care responsibility or paying foster care maintenance payments).

75. A different federal child welfare data collection program, the National Child Abuse and Neglect Data System, similarly fails to collect data regarding hidden foster care. That data, and publications based on it, reports the number of cases investigated by CPS agencies and the findings of those investigations but does not count CPS-arranged changes in custody as results of such investigations. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2017, at viii-ix (2018), https://perma.cc/7UUZ-KL5Y; *About NCANDS*, CHILD. BUREAU (June 18, 2015), https://perma.cc/ZTV3-LCBT. Moreover, this data reporting system is voluntary, not mandatory, for states. 45 C.F.R. § 1355.20(a).

76. KARIN MALM ET AL., CHILD TRENDS, PUB. NO. 2019-34, VARIATIONS IN THE USE OF KINSHIP DIVERSION AMONG CHILD WELFARE AGENCIES: EARLY ANSWERS TO IMPORTANT QUESTIONS 3 (2019), https://perma.cc/LR2N-GSVW.

77. Data were gathered from the second National Survey of Child and Adolescent Well-Being, a federally funded study of children whose child protection investigations closed between February 2008 and April 2009. MELISSA DOLAN ET AL., OFFICE OF PLANNING, RESEARCH & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., REP. NO. 2011-27a, NSCAW II BASELINE REPORT: INTRODUCTION TO NSCAW II, at 1 (2011), https://perma.cc/UHD8-U9WR.

78. *See id.* at 9. The percentage of such children in informal kinship care following a CPS investigation is 47% in rural areas and 49% in urban areas. Wendy A. Walsh, Carsey Inst., Fact Sheet No. 24, Informal Kinship Care Most Common Out-of-Home Placement After an Investigation of Child Maltreatment 1 (2013), https://perma.cc/AQN9-3746.

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time a child ends up in the formal foster care system (meaning the child has a court case and some kind of formalized placement with kin, with nonkinship foster parents, or in a group home), and the other half of the time the child ends up living with kin informally in hidden foster care. Extrapolated nationwide, this study suggests that 250,000 or more children enter hidden foster care every year.[79] A 2002 study estimated that at least 137,000 abused or neglected children were living with kinship caregivers after CPS agency, but not court, involvement.[80] Other data points are consistent with there being tens if not hundreds of thousands of children in hidden foster care each year. A 2007 survey of state CPS agencies found that thirty-nine states used hidden foster care—or, in the language of the survey, "rel[ied] on kin to divert children from foster care."[81] Whatever the precise number, multiple scholars and think tanks reviewing the topic describe the practice as frequent—it is "quite common,"[82] "increasing,"[83] "an increasingly important part of child welfare practice,"[84] and used "often."[85]

Data from some specific states confirm that tens of thousands of children pass through hidden foster care each year in those states alone—suggesting the national figure is likely in the hundreds of thousands. Texas authorities documented that in 2014, they facilitated "informal kinship placements" about 34,000 times[86]—almost three times as often as Texas authorities brought cases

79. The number of children who enter formal foster care (kinship or otherwise) is reported by each state to the federal government and has ranged from 251,000 to 273,000 annually between 2009 and 2018. Children's Bureau, U.S. Dep't of Health & Human Servs., Trends in Foster Care and Adoption: FY 2009-FY 2018, at 1 (2019), https://perma.cc/6R6H-73LJ.

80. *See* Jennifer Ehrle et al., Urban Inst., Snapshots of America's Families III: Kinship Foster Care; Custody, Hardships, and Services 2 fig.1 (2003), https://perma.cc/67Z7-8VSM (reporting that 542,000 abused and neglected children with kinship caregivers were "involved with social services" but only 405,000 of those were also "involved with courts," a difference of 137,000). The estimate increases to approximately 400,000 when excluding only those children in formal foster care, as at least one think tank has done. ANNIE E. CASEY FOUND., *supra* note 13, at 5.

81. ALLEN ET AL., *supra* note 67, at 11-13.

82. James P. Gleeson et al., *Becoming Involved in Raising a Relative's Child: Reasons, Caregiver Motivations and Pathways to Informal Kinship Care*, 14 CHILD & FAM. SOC. WORK 300, 308 (2009).

83. MALM & ALLEN, *supra* note 39, at 6.

84. Wallace & Lee, *supra* note 45, at 427.

85. Eunju Lee et al., *Placement Stability of Children in Informal Kinship Care: Age, Poverty, and Involvement in the Child Welfare System*, 95 CHILD WELFARE, no. 3, 2017, at 87, 89. Lee and her coauthors found that for children living informally with kin, "[a]lmost two-thirds had at least one CPS record prior to moving in with the current kin caregiver," *id.* at 98, although public child welfare agencies along with other community sources helped identify families for the study, which may have skewed the results, *see id.* at 105.

86. CHILDREN'S COMM'N, *supra* note 63, at 3.

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involving alleged child abuse or neglect to court.[87] Hidden foster care cases in Illinois have been estimated at 10,000 per year.[88] In Virginia, data for some local CPS agencies suggest that statewide, CPS agencies placed about 5,000 children in hidden foster care between July 2016 and December 2017[89]—a figure greater than the number of children placed in formal foster care in the same period.[90] In South Carolina, at least 2,318 children were living in kinship care under a safety plan rather than with their parents in the summer of 2018, without having gone to court.[91] South Carolina authorities reported that 4,239 children "entered foster care" that year;[92] had they brought all of the hidden foster care cases to court and counted them as removals, the number of reported removals would have increased 55%. Data taken from a New York state program to better support kinship caregivers found that, of those children with prior CPS involvement, the vast majority (77%) were placed with kinship caregivers without court proceedings.[93] Arizona media reported that 702

87. Texas reported 11,334 "victims with court action" in 2014. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2014, at 85 tbl.6-5 (2016), https://perma.cc/K44L-EBTQ.

88. *See* REDLEAF, *supra* note 7, at 43.

89. Katie O'Connor, *Every Year, Children Are Diverted Away from Foster Care and Placed with Relatives. Nobody Knows What Happens Next.*, VA. MERCURY (June 3, 2019), https://perma.cc/HEV6-H4JE; *see also* VA. DEP'T OF SOC. SERVS., REVIEW OF CURRENT POLICIES GOVERNING FACILITATION OF PLACEMENT OF CHILDREN IN KINSHIP CARE TO AVOID FOSTER CARE PLACEMENTS IN THE COMMONWEALTH AND THE RECOMMENDATIONS FOR REGULATIONS GOVERNING KINSHIP CARE PLACEMENTS 4 (2016), https://perma.cc/HET8-8VJG (reporting that 94% of local Virginia CPS agencies use the "widespread" practice).

90. Virginia removed and placed into formal foster care 2,158 children in fiscal year 2017. *See* CHILDREN'S BUREAU, *supra* note 75, at 90 tbl.6-4 (indicating that 1,280 victims and 878 nonvictims received foster care services). Assuming a roughly similar removal rate, there would have been about 3,300 children placed in formal foster care in the same eighteen-month time period when 5,000 were placed in hidden foster care.

91. *See* Taron Brown Davis, S.C. Dep't of Soc. Servs., State of Child Welfare Services 17 (Aug. 31, 2018) (presentation on file with author). This figure includes 105 "children living with a kinship caregiver during an open investigation" and 2,213 "children living with a kinship caregiver while [they are] receiving family preservation/in home treatment services." *Id.*

92. S.C. Dep't of Soc. Servs., Reasons Youth Entered Foster Care During SFY 2018, at 1 (2018) (capitalization altered), https://perma.cc/NGT7-VHD9.

93. Wallace & Lee, *supra* note 45, at 422. The director of that program testified that New York data show about 2,000 children every year are placed in a "kin placement" through "direct custody" other than foster care. Gerard Wallace & Ryan Johnson, NYS Kinship Navigator, Testimony for the Joint Legislative Hearing on the Governor's Proposed Human Services Budget 15 (2019) (capitalization altered), https://perma.cc/8DCA-MR49.

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children were "removed under a present-danger plan" in 2018.[94] Studies of states' differential response programs—which are designed to provide alternatives to formal investigations, court proceedings, and removals—have found that "at least five states permit a child to be removed from the home while the family participates in a differential response system."[95]

These authorities show that hidden foster care is used both while a child protection investigation is pending and after the agency concludes its investigation.[96] The distinction is important because limiting the practice to pending investigations would limit its scope significantly, both in overall number and in length, because state laws require CPS agencies to complete investigations within a set time period.[97] The record of CPS agencies using hidden foster care well beyond investigation periods—and sometimes for permanent changes in custody[98]—is thus a key element of the practice's wide scope.

In addition to the practice's wide scope, evidence also suggests that hidden foster care has grown in frequency over the last decade and a half. A 2007 survey found an increasing reliance by states on the practice as part of a larger trend in which states sought to avoid foster care placements.[99] By 2010, the National Conference on State Legislatures (NCSL) listed "divert[ing] children from foster care, when safe and appropriate, through voluntary placement with relatives" as a recommended practice.[100] Moreover, Congress enacted federal statutes that facilitate the practice in 2008 and again in 2018,[101] making continued expansion likely.

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94. Patty Machelor, *Arizona's Voluntary Child Removals Use Method Challenged in Other States*, ARIZ. DAILY STAR (May 25, 2019), https://perma.cc/A2UR-9BCW. As a percentage of the system, this count is relatively modest—4.6% of all removals in Arizona—likely because they are limited to twenty-eight days. *Id.*

95. Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 633 (2012).

96. Safety plans are sometimes described as only governing cases during pending investigations. *See, e.g.*, Shellady, *supra* note 14, at 1616. But, as certain sources cited in notes 91-95 above have found, the practice is used in cases when investigations are complete and CPS agencies seek to work with the family without using formal foster care. *See, e.g.*, Davis, *supra* note 91. The practice is also used in some states' differential response programs, which do not involve any investigation. *See* McGrath, *supra* note 95, at 633.

97. *See, e.g.*, D.C. CODE § 4-1301.06(a) (2019) (30-day limit); S.C. CODE ANN. § 63-7-920(A)(2) (2019) (45-day limit, with a single 15-day extension available for good cause).

98. *See supra* Part I.A.3.

99. *See* ALLEN ET AL., *supra* note 67, at 12.

100. MADELYN FREUNDLICH, NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE STRATEGIES TO SAFELY REDUCE THE NUMBER OF CHILDREN IN FOSTER CARE 8-9 (2010), https://perma.cc/5HD8-UZ29. The NCSL went so far as to recommend legislation requiring CPS agencies to use hidden foster care. *See id.*

101. *See infra* Part V.A.

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This large and growing scope leads to an important conclusion—hidden foster care is so common that it is roughly on par in frequency with formal foster care itself. It affects roughly as many children—many of whom likely are unaware of the difference between being in the formal or hidden foster care systems. This practice is not a narrow one used in unusual cases,[102] but one that is a system of its own, and one that requires a comparable amount of regulation and critical analysis.

II. Due Process Challenges and Justifications

Any state action that interferes with parental authority over children—and certainly state action that separates parents and children—raises substantive and procedural due process concerns. Parents have the fundamental right to the care, custody, and control of their children, as the Supreme Court has recognized in a long set of opinions for nearly a century.[103] The law also presumes that children benefit from this arrangement—absent evidence of parental unfitness, parents are presumed to act in their children's best interest.[104] Consistent with that presumption, multiple lower courts have recognized that children also have a fundamental constitutional right to live in their parents' custody.[105] To protect these rights, the Supreme Court, state courts, and state legislatures have adopted a range of due process protections. Before the state can declare a child neglected or dependent, the state must prove a parent unfit.[106] If the state seeks to remove a child before it is able to prove a parent unfit at trial, it must meet an even more difficult standard—not only that the parent has abused or neglected the child, but that the abuse or neglect presents a risk so substantial and imminent that emergency action is necessary to protect the child.[107]

102. *Cf.* ANNIE E. CASEY FOUND., *supra* note 13, at 3 (noting that supporters argue that kinship diversion is only appropriate for "cases in between" and critics argue that it is "too often used as a default").

103. *See* Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion); Santosky v. Kramer, 455 U.S. 745, 753, 758-59 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981); Parham v. J.R., 442 U.S. 584, 602 (1979); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

104. *See Troxel*, 530 U.S. at 68 (plurality opinion); *Parham*, 442 U.S. at 602.

105. *See, e.g.*, Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 1999); Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); *In re* Juvenile Appeal, 455 A.2d 1313, 1318 (Conn. 1983); Amanda C. v. Case, 749 N.W.2d 429, 438 (Neb. 2008). Consistent with this view, the Supreme Court in *Stanley* wrote that when children are removed from their parents, they "suffer from uncertainty and dislocation." *Stanley*, 405 U.S. at 647.

106. A parent is entitled to a "hearing on [their] fitness as a parent before [their] children [are] taken from [them]." *Stanley*, 405 U.S. at 649.

107. *See, e.g.*, S.C. CODE ANN. § 63-7-620(A)(1) (2019); *In re Juvenile Appeal*, 455 A.2d at 1319-20.

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Hidden foster care avoids court hearings constitutionally required in the formal foster care system, so the most obvious legal question is whether that avoidance of court oversight violates the parents' and children's rights to family integrity without due process of law. The question hinges on the voluntariness of parents' agreements to safety plans calling for their children to live in someone else's physical custody. If parents voluntarily choose to shift physical custody, then hidden foster care is no different from the situation of millions of children who live with individuals other than their parents without state child protection agency intervention.[108] If, however, the state coerces parents to give up custody through threats to remove children and initiate court proceedings, then that is not a voluntary choice and the state has violated the Due Process Clause.

All federal courts to address these questions have agreed that CPS authorities violate parents' due process rights if they make legally unjustifiable threats to induce parents to accept a change in their children's physical custody.[109] The question whether hidden foster care is acceptable when CPS agency threats to remove children have some legal basis, however, has split federal circuits,[110] and the following Subpart will outline circuits' competing arguments. This Article takes the position that threatening to remove a child and file an abuse or neglect case against a parent is inherently coercive, thus creating a procedural due process problem with hidden foster care. The remainder of this Article, however, does not depend on that conclusion. As the next Subpart establishes, courts finding that hidden foster care is truly voluntary still use analysis that supports the proposals for regulation that I advance in Part VI.

A. Foster Care or Hidden Foster Care: Like a Choice of Cocktails

The leading case for the proposition that hidden foster care is voluntary and thus not in violation of due process is *Dupuy v. Samuels*. In *Dupuy*, the Seventh Circuit rejected class action plaintiffs' challenge to the Illinois CPS agency's

108. The U.S. Census Bureau's Current Population Survey estimates that nearly 3 million children live without any parents. *See Historical Living Arrangements of Children: Living Arrangements of Children Under 18 Years Old; 1960 to Present*, U.S. CENSUS BUREAU, https://perma.cc/5CGX-7JTC (last updated Oct. 10, 2019) (estimating that in 2019, 2,319,000 children lived with relatives without parents, and 647,000 lived with nonrelatives without parents). Only about 450,000 children are in formal foster care. CHILDREN'S BUREAU, *supra* note 16, at 1. The number of children who pass through hidden foster care is likely in the low six figures, *see supra* Part I.B, leaving the vast majority of children in kinship care without any CPS agency involvement.

109. *See infra* notes 119-22 and accompanying text.

110. *See* Daniel Pollack et al., *The Use of Coercion in the Child Maltreatment Investigation Field: A Comparison of American and Scottish Perspectives*, 22 U. MIAMI INT'L & COMP. L. REV. 129, 142-46 (2015).

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frequent practice of threatening to remove children and initiate child protection proceedings if parents did not agree to change a child's physical custody via a safety plan.[111] *Dupuy* described a safety plan as requiring one parent to leave the home and/or only see their child in the presence of an approved family member, or requiring that the child live with a family member other than a parent.[112]

The trial court findings included several details used by the plaintiffs to cast doubt on safety plans' voluntariness.[113] CPS caseworkers usually presented plans for parents to sign with no meaningful parental input.[114] The CPS agency, both in writing and verbally, threatened parents with the removal of their children if they failed to agree.[115] Safety plans generally did not specify a time period for which they would be in effect, nor did the agency create a procedure to contest a safety plan.[116]

Nonetheless, Judge Posner's opinion concluded that hidden foster care is the result of voluntary choices by parents to temporarily relinquish physical custody of their child. In the Seventh Circuit panel's view, an agency demanding that a parent relinquish physical custody through a safety plan and threatening to remove a child and open a CPS case in family court if the parent does not comply is simply giving a parent an option they would not otherwise have—the safety plan is merely an "offer" provided by CPS authorities as an alternative to going to court.[117] It continued:

> We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?[118]

Judge Posner's reasoning offers several important points in support of this conclusion. First, this scenario is only truly voluntary when the CPS agency *legitimately* threatens to remove the child and/or go to court; if the CPS agency

111. Dupuy v. Samuels, 465 F.3d 757 (7th Cir. 2006). For a description of the *Dupuy* litigation, including a critique of the Seventh Circuit's ruling by an attorney for the plaintiffs, see REDLEAF, *supra* note 7, at 37-50. *See also* McGrath, *supra* note 95, at 677-81.

112. *Dupuy*, 465 F.3d at 760.

113. *See* McGrath, *supra* note 95, at 678.

114. Dupuy v. Samuels, 462 F. Supp. 2d 859, 867 (N.D. Ill. 2005), *aff'd*, 465 F.3d 757.

115. *Id.* at 868.

116. *Id.* at 871.

117. *Dupuy*, 465 F.3d at 760 (noting that "sometimes, in lieu of immediately removing the child from its parents, the state will offer the parents the option of agreeing to a 'safety plan'"); *id.* at 761 ("The state does not force a safety plan on the parents; it merely offers it.").

118. *Id.* at 762.

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lacks the factual basis or legal authority to carry out such a threat, then making it would render coercive an insistence that a parent agree to a safety plan.[119] Judge Posner distinguished legitimate legal threats from "objectionable" coercion based on legally unjustifiable threats.[120] (He did not address the reasonableness of expecting parents to evaluate the legitimacy of a CPS agency threat to remove their children.[121]) Further, Judge Posner distinguished seemingly contrary precedent as involving situations in which CPS authorities made improper threats.[122]

Second, Judge Posner drew an analogy between a safety plan leading to hidden foster care and a negotiated settlement—either a criminal plea bargain or a civil pretrial settlement.[123] Criminal plea bargains provide significantly more formal procedural protections for defendants, so they present a curious analogy. Plea bargains occur after defendants have been formally charged, while safety plans occur without CPS agencies filing petitions outlining alleged instances of abuse or neglect. Moreover, plea bargain discussions occur after a defendant has retained or has been appointed a lawyer, and the prosecutor and defense attorney negotiate a settlement based in large part on what would likely happen if the case proceeded to trial.[124] Meanwhile, safety plans occur

119. *See id.* at 762-63.

120. *Compare id.* at 762 ("It is not a forbidden means of 'coercing' a settlement to threaten merely to enforce one's legal rights."), *with id.* ("Coercion is objectionable . . . when illegal means are used to obtain a benefit. . . . There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse . . . .").

121. Ryan Shellady criticizes *Dupuy*'s focus on the legitimacy of a state threat as "suggest[ing] that parents looking down the barrel of the state's gun ought to know whether its chamber is loaded." Shellady, *supra* note 14, at 1629.

122. *Dupuy*, 465 F.3d at 763 (citing Doe v. Heck, 327 F.3d 492 (7th Cir. 2003); and Croft v. Westmoreland Cty. Children & Youth Servs., 103 F.3d 1123 (3d Cir. 1997)). At least one reported case has applied *Dupuy*'s distinction between legitimate and legally unjustifiable threats to recognize a valid procedural due process claim. Schulkers v. Kammer, 367 F. Supp. 3d 626, 639-40 (E.D. Ky. 2019) (describing a CPS agency threat to remove children if parents did not agree to safety plan as lacking a sufficient basis in facts and law), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020).

123. *Dupuy*, 465 F.3d at 761. Cases in other circuits have relied on *Dupuy*'s analogy to civil settlement. *E.g.*, Smith v. Williams-Ash, 520 F.3d 596, 600 (6th Cir. 2008) (citing *Dupuy*, 465 F.3d at 761-62); Sangraal v. City & County of San Francisco, No. 3:11-cv-04884, 2013 WL 3187384, at *9 (N.D. Cal. June 21, 2013) (citing *Dupuy*, 465 F.3d at 760-62), *aff'd mem. sub nom.* Jones v. City & County of San Francisco, 621 F. App'x 437 (9th Cir. 2015).

124. At least that is how plea bargaining ought to work. Deviations from this norm—such as "take it or leave it" plea offers, or "meet 'em and plead 'em" practice—are rightly criticized by commentators. *See, e.g.*, Margareth Etienne, *A Lost Opportunity for Sentencing Reform: Plea Bargaining and Barriers to Effective Assistance*, 68 S.C. L. REV. 467, 482-83 (2017) (describing "take it or leave it" plea offers as inducing fast plea bargains); Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 295-96 (2016) (describing "meet 'em and plead 'em" practice).

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without either side having the benefit of counsel and therefore with a weaker ability for the law and possible legal process to inform the safety plan. Moreover, criminal defendants not only have the right to counsel, but are protected from plea decisions that result from erroneous legal advice through ineffective assistance of counsel cases.[125] A judge conducts a colloquy with the defendant to ensure the voluntariness of the plea; indeed, a typical question includes whether anyone has threatened the defendant in order to induce the plea.[126] No such colloquy occurs with safety plans.

Civil pretrial settlements provide a closer, but still imperfect, analogy for the Seventh Circuit. They also involve important due process protections: all of the procedures of civil litigation, sometimes coupled with representation of all parties.[127] Moreover, they are typically negotiated over longer periods of time, allowing for calmer deliberation than a threat to take custody might permit.[128]

In contrast, hidden foster care cases are not just any civil cases. Rather, they involve the fundamental liberty interest of parents in the "care, custody, and control" of their children[129] combined with state action intended to effectuate infringement of that interest. Moreover, in the safety plan context, the only check on an overbearing state agency is a parent's willingness to say no and insist on their day in court. And this decision cannot be separated from its legal and social context. It is not a cocktail party in which a privileged host offers a drink to a privileged guest. It occurs when a state agency with awesome powers to destroy families and create new ones interacts with families largely of low socioeconomic status, often with low social capital, and typically

125. *See, e.g.*, Lee v. United States, 137 S. Ct. 1958, 1968-69 (2017) (overturning a defendant's guilty plea based on incorrect legal advice about the immigration consequences of that plea); Lafler v. Cooper, 566 U.S. 156, 174-75 (2012) (ruling for a defendant who declined a plea offer based on incorrect legal advice and later faced more severe consequences following trial); Missouri v. Frye, 566 U.S. 134, 147 (2012) (finding constitutionally deficient performance when attorney failed to communicate a plea offer and the offer lapsed as a result); Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that the failure to advise a client regarding the risk of deportation created by a plea bargain is constitutionally deficient).

126. *See* FED. R. CRIM. P. 11(b)(2) ("Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).").

127. There is generally no right to appointed counsel in most civil cases, but parties frequently do have counsel or at least access to "self-help" centers to obtain basic information about the law and legal process. *See, e.g.*, *Self-Help Centers*, A.B.A., https://perma.cc/E78Z-SN4B (archived Feb. 12, 2020).

128. Shellady, *supra* note 14, at 1628-29.

129. Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

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without funds, counsel, or much education.[130] Indeed, the Supreme Court has noted the risk of error that can result from power imbalances between the state and the disproportionately poor parents in contact with CPS agencies.[131] Other factors—such as a parent's immigration status or disability—may exacerbate this power imbalance further.[132] In this context, without the procedural protections held by criminal defendants or civil litigants, it is doubtful that much meaningful negotiation occurs.[133]

Despite these concerns about *Dupuy*'s logic, several other federal courts have ruled similarly.[134] In *Smith v. Williams-Ash*, the Sixth Circuit rejected David and Melody Smith's claim that a safety plan shifting physical custody of their children to family friends violated their procedural due process rights.[135] Following CPS officials' concern that the Smiths' house was too "filthy" and "clutter[ed]" to be safe, a social worker "persuaded the Smiths to consent to a safety plan that removed the children."[136] The Smiths alleged they cleaned their home and asked the CPS social worker what additional steps they needed to take in order to regain custody of their children, and the worker added requirements, "ignored their requests for information[,] and threatened to permanently remove their children if they stopped cooperating."[137] CPS authorities only permitted the children to return to their parents two days

130. *See, e.g.*, Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVICES REV. 42, 42 (2019) (describing poverty and related factors as affecting "[t]he vast majority of child welfare-involved parents"); Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 385 (1999) ("In child welfare cases, where the individual is pitted against the vast power and resources of the state, the power imbalance is particularly extreme. And in the vast majority of cases, the fact that the parent is female, poor, uneducated, and nonwhite, exacerbates this inherent power disparity.").

131. *See* Santosky v. Kramer, 455 U.S. 745, 762-63 (1982).

132. *See, e.g.*, ANNIE E. CASEY FOUND., UNDERCOUNTED. UNDERSERVED.: IMMIGRANT AND REFUGEE FAMILIES IN THE CHILD WELFARE SYSTEM 3-5 (2006), https://perma.cc/UYL9-FVED (describing immigrant families' vulnerability in the child protection system); Ella Callow, *Maintaining Families When Parents Have Disabilities*, 28 CHILD L. PRAC. 129, 129 (2009) (describing high removal rates from parents with disabilities).

133. *See* McGrath, *supra* note 95, at 666, 679.

134. *E.g.*, Smith v. Williams-Ash, 520 F.3d 596, 597-98 (6th Cir. 2008) (affirming the dismissal of civil rights litigation because parents "consented to the removal of their children pursuant to a voluntary 'safety plan'"); Sangraal v. City & County of San Francisco, No. 3:11-cv-04884, 2013 WL 3187384, at *9 (N.D. Cal. June 21, 2013) (holding that voluntary consent to a safety plan would eliminate any constitutional claim), *aff'd mem. sub nom.* Jones v. City & County of San Francisco, 621 F. App'x 437 (9th Cir. 2015).

135. 520 F.3d at 597-98.

136. *Id.* at 598.

137. *Id. Smith* was decided on summary judgment, so these allegations were assumed to be true. *Id.* at 598-99.

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after the parents filed a federal lawsuit alleging a due process violation.[138] The Sixth Circuit emphasized written elements of the safety plan at issue, including form language reciting that the parents' "decision to sign this safety plan is voluntary," threatening that if parents "will not be able to continue following the plan, [CPS] may have to take other action(s) to keep [their] child(ren) safe," and requiring parents to inform their caseworker if they decide not to abide by the safety plan.[139] Relying on that form language, the Sixth Circuit followed *Dupuy* and concluded the custody change was voluntary.[140]

B. An Inherently Coercive Practice

In considering whether hidden foster care violates parents' and children's due process rights, the stronger view is that even legally justified threats to remove children are so coercive as to render involuntary any subsequent parental agreements to change physical custody. This Subpart describes the Third Circuit case law that so holds and offers additional reasons to consider these agreements involuntary. As importantly, this Subpart notes the many legal and policy questions that remain even if this view of the constitutional issue prevails.

1. *Croft v. Westmoreland County Children & Youth Services*

The Third Circuit stands apart from *Dupuy* through a decision that has been understood to hold that safety plans based on a threat of child removal are inherently coercive and thus require some due process protections. *Croft v. Westmoreland County Children & Youth Services* involved a CPS investigation of vague concerns that Henry and Carol Croft were abusing their four-year-old daughter based on a child protection hotline call that the child "had recently been out of the house naked, walked to a neighbor's house, knocked on the door, and told the neighbors that she was 'sleeping with mommy and daddy.'"[141] The parents denied abuse and explained the conduct at issue, but the CPS investigator gave the father "an ultimatum: unless he left his home and separated himself from his daughter until the investigation was complete, she would take [the child] physically from the home that night and place her in foster care."[142]

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138. *Id.* at 599.

139. *Id.* at 598, 600.

140. *Id.* at 599-600; *see also* Teets v. Cuyahoga County, 460 F. App'x 498, 503 (6th Cir. 2012) (applying *Smith* and *Dupuy* to hold that parents' agreement to a safety plan was voluntary).

141. 103 F.3d 1123, 1124 (3d Cir. 1997).

142. *Id.*

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The Third Circuit pointed to evidence that CPS authorities acted beyond their legal authority. It held that an emergency removal was not justified on the facts, which the court described as "a six-fold hearsay report by an anonymous informant."[143] Absent stronger evidence, CPS authorities could not lawfully remove a child, either directly or through a safety plan.[144] Moreover, one CPS witness had even testified the agency required that a "parent accused of sexual abuse must prove beyond any certainty that there was no sexual abuse before [the CPS worker] would be permitted to leave a child with his or her parents."[145] This practice unconstitutionally shifted the burden of proving parental unfitness from the state to the parent.[146] And this unconstitutional burden shift was evident in the record—the CPS investigator had testified that she insisted on separating the father from his daughter despite admitting to lacking enough evidence to determine if the Crofts had abused their daughter and needing to investigate further.[147] *Croft* could thus be read as consistent with *Dupuy*—holding that the problem was not the safety plan itself, but the CPS authorities' lack of adequate evidence to justify their insistence on that plan.

However, *Croft* also included a different key holding, which suggests that no CPS threat of removal could lead to a truly voluntary safety plan. The CPS agency gave the Crofts an "ultimatum," which caused a "dilemma" for the parents.[148] And the court scoffed at the CPS defendants' effort to describe the parents' subsequent actions as voluntary: "This notion we explicitly reject. The threat that unless Dr. Croft left his home, the state would take his four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken."[149] This language stands in

143. *Id.* at 1126.

144. *See id.*

145. *Id.* at 1125.

146. *Cf.* Parham v. J.R., 442 U.S. 584, 602-03 (1979) (providing that parents are presumed to act in their children's best interest); Stanley v. Illinois, 405 U.S. 645, 649 (1971) (holding that "as a matter of due process of law, [a parent is] entitled to a hearing on [their] fitness as a parent before [their] children [a]re taken from [them]"). State courts have explicitly held that the "party seeking to interfere with" the fundamental right of family integrity—in child protection cases, the state—bears the burden of proof. *See, e.g.*, *In re* Juvenile Appeal, 455 A.2d 1313, 1323 (Conn. 1983). State statutes universally impose on states the burden of proving that parents have abused or neglected their children. Ashley J. Provencher, Josh Gupta-Kagan & Mary Eschelbach Hansen, *The Standard of Proof at Adjudication of Abuse or Neglect: Its Influence on Case Outcomes at Key Junctures*, 17 SOC. WORK & SOC. SCI. REV., no. 2, 2014, at 22, 27.

147. *Croft*, 103 F.3d at 1127.

148. *Id.* at 1125.

149. *Id.* at 1125 n.1; *see also* Pearson, *supra* note 14, at 856 (describing this "important aspect" of *Croft*).

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marked contrast to *Dupuy*'s repeated use of the term "offer" to describe CPS authorities' conduct and the term "voluntary" to describe parents' responses to CPS demands. Academic commentators have echoed these concerns that CPS agencies arrange hidden foster care through coercive threats of removal and court action, describing parents' decision to acquiesce to such agency threats as "voluntary"—complete with scare quotes.[150]

Subsequent district court cases within the Third Circuit have interpreted *Croft* to deem coercive *any* safety plan resulting from a CPS threat to remove a child. For example, *Starkey v. York County* involved abuse and neglect allegations that were supported by significantly more evidence than those in *Croft*—to the point that the district court described the two cases as "entirely distinguishable."[151] But the court understood *Croft* to have clearly established a legal rule that does not depend on the strength of the state's evidence of abuse—"that coercing parents to sign a safety plan under threat that the county or state will otherwise take emergency custody of their children raises procedural due process concerns."[152] Responding to the CPS defendants' reliance on *Dupuy*, the trial court cited *Croft*'s dicta as foreclosing any argument that the safety plan was voluntary.[153] Another federal district judge has similarly held that *Croft* "expressly rejected" any *Dupuy* argument that safety plans resting on threats to remove a child were anything other than "blatantly coercive."[154]

The dissent in *Smith v. Williams-Ash* uses *Dupuy*'s logic to show hidden foster care can, in practice, be coercive. Judge Ronald Lee Gilman emphasized that *Dupuy* rested on the conclusion that state authorities threatened only to enforce their actual legal rights and did not threaten to take action without a legal basis.[155] He reasoned that specific statements from the CPS caseworker to

150. *See* Garlinghouse & Trowbridge, *supra* note 46, at 117; *see also* Sacha M. Coupet, *What Price Liberty?: The Search for Equality for Kinship-Caregiving Families*, 2013 MICH. ST. L. REV. 1249, 1256 (describing the *Dupuy* holding as something that "would surely not be tolerated elsewhere"); McGrath, *supra* note 95, at 633, 677-81 (critiquing the voluntariness analysis in *Dupuy*); Pearson, *supra* note 14, at 836-38 (critiquing safety plans as not truly voluntary).

151. No. 1:11-cv-00981, 2012 WL 9509712, at *8 (M.D. Pa. Dec. 20, 2012).

152. *Id.* at *9. Because the plaintiffs alleged a violation of federal civil rights law and defendants claimed qualified immunity, the plaintiffs had to show that a clearly established federal right existed, and the court found such a right in *Croft*. *Id.*

153. *Id.* at *10-11.

154. *E.g.*, Isbell v. Bellino, 962 F. Supp. 2d 738, 747 (M.D. Pa. 2013) (quoting *Starkey*, 2012 WL 9509712, at *11). At least one trial court has held that *Croft* did not clearly establish a procedural due process rule, but that holding depended on a narrow reading of what constitutes a clearly established right and *Croft*'s focus on substantive due process. *See* Exel v. Govan, No. 1:12-cv-04280, 2016 WL 1118781, at *5 (D.N.J. Mar. 22, 2016), *aff'd*, 708 F. App'x 82 (3d Cir. 2018).

155. *See* Smith v. Williams-Ash, 520 F.3d 596, 601-02 (6th Cir. 2008) (Gilman, J., dissenting) (citing Dupuy v. Samuels, 465 F.3d 757, 761-63 (7th Cir. 2006)).

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the parents—threatening that the "children [would not] come home, period," perhaps forever—go beyond a threat to enforce a valid legal right.[156] Indeed, the facts of *Smith*—in which CPS authorities permitted the children to return merely two days after the parents filed a lawsuit challenging CPS's actions—"suggest[] that the agency may not have had good reason for continuing to detain the children."[157]

2. Coercion in other bodies of law

Case law governing voluntariness in other contexts could also support the view that threatening to remove children is inherently coercive. In a different child protection context, the Supreme Court raised in dicta (but did not decide) whether "supposedly 'voluntary' [foster care] placements are in fact voluntary."[158] Cases beyond child protection provide additional support for the conclusion that state actors threatening to take children into foster care is at least sometimes grounds for finding subsequent actions by parents involuntary.

Police interrogation cases are particularly informative because both the presentation of a safety plan and a police interrogation involve state actors with massive power speaking to a person, typically unrepresented, under suspicion and seeking cooperation—sometimes making some kind of threat to induce that cooperation. Cases evaluating the voluntariness of criminal suspects' confessions have explored what amounts to an unconstitutional threat and what constitutes a permissible warning of the consequences of a suspect's decisions.[159] And the Supreme Court has held police threats to have children "taken away" and placed with "strangers," along with statements that a parent "had better do what they told [them] if [they] wanted to see [their] kids again," are unduly coercive and render a subsequent confession involuntary.[160]

156. *Id.* at 602 (alteration in original).

157. *Id.* at 603.

158. Smith v. Org. of Foster Families for Equal. & Reform (*OFFER*), 431 U.S. 816, 834 (1977). While related to the hidden foster care discussed in this Article, the practice of voluntary foster care placement differs in that parents place children in state legal custody, and the practice is generally subject to long-standing statutory regulation. *E.g.*, N.Y. SOC. SERV. LAW § 384-a (McKinney 2019).

159. In *Miranda v. Arizona*, the Court wrote that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." 384 U.S. 436, 476 (1966). In contrast, police statements that certain decisions would or would not help suspects are not necessarily viewed as threatening. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 727 (1979) (concluding that police "indicat[ing] that a cooperative attitude would be to [the] respondent's benefit" was not threatening).

160. Lynumn v. Illinois, 372 U.S. 528, 531, 534 (1963). The officers "largely corroborated" this account of events. *Id.* at 532. One subsequent lower court case held that a similar threat

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As Katherine Pearson has argued, those holdings support the *Croft* conclusion that threats to remove children if parents do not agree to hidden foster care render any such agreement inherently suspect.[161]

Similar issues have arisen in Fourth Amendment search cases, with some courts holding that threats to remove children at least sometimes render consents to search involuntary. In *United States v. Ivy*, the Sixth Circuit held that "hostile police action against a suspect's family is a factor which significantly undermines the voluntariness of any subsequent consent."[162] In *Ivy*, the "hostile police action" included a law enforcement officer threatening to take the suspect's child into state custody if the suspect did not consent to a search of his home, leading the court to declare the suspect's consent was involuntary.[163] In *United States v. Tibbs*, an officer's threat to call the CPS agency to remove a child rendered the parent's consent involuntary.[164] Determining the voluntariness of a search depends on the totality of the circumstances and thus depends on the facts of particular cases.[165] Some courts have held alleged threats do not constitute coercion when, among other things, they are not explicit[166] or the threats accurately share law enforcement plans without other indicators of coercion.[167]

3. No prohibition on safety plans

Courts in the Third Circuit finding constitutional violations make clear they do not prohibit CPS agencies from using safety plans to effectuate changes in physical custody. Rather, they hold "a parent is entitled to some level of procedural protection in order to challenge the alteration of their parental rights, and that such opportunities must be provided in a meaningful and

to separate parent and child "for a while" rendered a resulting confession involuntary. United States v. Tingle, 658 F.2d 1332, 1334, 1337 (9th Cir. 1981); *see also* United States v. Byram, 145 F.3d 405, 408 (1st Cir. 1998) ("Certainly some types of police trickery can entail coercion: consider a confession obtained because the police falsely threatened to take a suspect's child away from her if she did not cooperate.").

161. *See* Pearson, *supra* note 14, at 836 & n.4 (describing the "voluntary label" as "often misleading").

162. 165 F.3d 397, 404 (6th Cir. 1998).

163. *Id.* at 402, 404.

164. 49 F. Supp. 2d 47, 53 (D. Mass. 1999).

165. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

166. *E.g.*, United States v. Henderson, 437 F. App'x 96, 99 (3d Cir. 2011); United States v. Santiago, 428 F.3d 699, 705 (7th Cir. 2005).

167. United States v. Miller, 450 F.3d 270, 272-73 (7th Cir. 2006), *abrogated on other grounds by* Kimbrough v. United States, 552 U.S. 85 (2007). The Seventh Circuit decided *Miller* four months before *Dupuy*, in a decision by Judge Easterbrook who also sat on the *Dupuy* panel.

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timely manner after the deprivation."[168] As with any procedural due process violation, the remedy is not a prohibition on the practice, but more process. Courts in the Third Circuit have not specified what process is required,[169] leaving it to legislative and executive branches to determine in the first instance what process would suffice, subject to future court challenges.[170]

An earlier Second Circuit case also demonstrates that procedural protections can justify safety plans and kinship diversion. In *Gottlieb v. County of Orange*, the court considered the procedural due process claim of a father who CPS officials required, under threat of immediate removal of the children, to leave his home pending an investigation into sexual abuse allegations.[171] The Second Circuit acknowledged that the father suffered a substantive deprivation, but noted that under the applicable local procedures, he could have insisted upon judicial review of that deprivation at any time, and that he had the opportunity to consult with an attorney before agreeing to give up physical custody of his children.[172]

In sum, the coercive beginnings of hidden foster care cases raise profound due process concerns; and this Article concludes that they likely violate parents' and children's due process rights. Accordingly, one cannot escape the need to outline a set of legal regulations to govern this practice. Before outlining such regulations, a deeper exploration of the risks and benefits of hidden foster care, and the regulatory and financial structures that lead to the practice, is necessary.

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168. *E.g.*, Isbell v. Bellino, 962 F. Supp. 2d 738, 758 (M.D. Pa. 2013); *cf.* Starkey v. York County, No. 1:11-cv-00981, 2012 WL 9509712, at *11-12 (M.D. Pa. Dec. 20, 2012) (describing the law as preventing separation of parents and child "absent *any* procedural safeguards," and faulting CPS documents for "mak[ing] no mention of . . . the Plaintiffs' rights" related to the safety plan).

169. *E.g.*, *Starkey*, 2012 WL 9509712, at *11-12.

170. These courts likely could order the state to provide some specific protections—for instance, a procedure that permits a parent to challenge a safety plan within, say, forty-eight hours. But courts' holdings reflect an apparent preference to defer to other branches of government to define specific procedures. Moreover, legislative and executive branch regulation could lead to more comprehensive regulatory schemes. Both points underscore that legislative and regulatory changes are necessary reforms, even if courts uniformly followed the *Croft* analysis. Other scholars have also concluded that, even with *Croft*, legislative changes are needed. *See* Pearson, *supra* note 14, at 873; *infra* notes 332-35 and accompanying text.

171. 84 F.3d 511, 515 (2d Cir. 1996). In *Gottlieb*, the father's five-year-old daughter alleged abuse, but later medical examinations led doctors to conclude that there was no evidence of sexual abuse. *Id.* at 513, 515.

172. *Id.* at 522.

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III. Policy Concerns About and Justifications for Hidden Foster Care

Hidden foster care has elicited criticism from across the child protection ideological spectrum. Those concerned about CPS agencies removing children too frequently have litigated against the practice and written critically of its implications for family integrity.[173] Those concerned that CPS agencies defer to family integrity too much have critiqued hidden foster care for leaving children in what they see as unsafe situations without the safety precautions of formal foster care.[174] At the same time, there is an argument to be made for hidden foster care in some situations—it is less legally invasive, it reduces the risk of the state placing children in foster care with strangers, and it threatens parents and children with less state intervention.

The comparative pros and cons of hidden foster care and formal kinship foster care could lead some parents and kinship caregivers to seek one option and others to seek the other—which raises the question of how these individuals make these decisions. But the social work and think tank literature gives reason for concern that CPS agencies do not provide caregivers or parents with the information necessary to make those decisions and instead effectively make those decisions for families. One recent think tank summary concludes that "practice varies" and "families do not obtain consistent and comprehensive information about the service and custody options available during a family crisis," and, in particular, that CPS caseworkers "infrequently" tell kinship caregivers that formal foster care brings with it financial assistance.[175]

A. Benefits of Hidden Foster Care and Downsides of Formal Kinship Care

Despite the concerns raised in Part III.B below, there are strong reasons why some families might prefer informal changes in custody to avoid the formal foster care system. Placing the child in CPS agency custody subjects the child (and the kinship caregiver) to agency rules and supervision—something many families "consider[] intrusive and not family-friendly."[176] Kinship caregivers face a potential trade—they could receive foster care maintenance payments and other support from the state CPS agency, but only in exchange for greater oversight. Dorothy Roberts has argued that "transferring parental authority to

173. Diane Redleaf, then the director of the Family Defense Counsel, was counsel for the plaintiffs in *Dupuy* and has written about that case and related safety plan issues. REDLEAF, *supra* note 7, at 37-50. Other commentators have raised similar concerns. *See, e.g.*, Pearson, *supra* note 14, at 836; Shellady, *supra* note 14, at 1626-34.

174. Bartholet, *supra* note 15, at 1365-67.

175. MALM & ALLEN, *supra* note 39, at 3, 5-6.

176. *Id.* at 3.

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the state is the price poor people must often pay for state support of their children."[177] Commentators have long critiqued public programs designed to enhance poor families' welfare as exercises in social control.[178] In the CPS context, family members may reasonably chafe at CPS agencies taking on greater formal authority over their lives.[179] For some, the financial benefits will make this trade worth it, but for some they will not. Many families would choose to forgo state assistance to avoid paying that price—but many would also accept state aid even with that price.[180]

One particular concern is that the imposition of formal foster care licensing requirements could prevent children from living with kin and instead lead to stranger foster care. Foster care licensing typically imposes multiple requirements that could disproportionately limit licenses for poor families—such as minimum bedroom space requirements or limits on the total number of children in a home,[181] or criminal background checks.[182] CPS agencies may waive such requirements if they deem the standard to be "non-safety" in nature.[183] Thus, kinship families, who are disproportionately poor, may reasonably fear they will face difficulty getting licensed. While CPS agencies could license them even with some concerns,[184] many parents and kinship caregivers may (reasonably) not trust CPS agencies with that discretion or be willing to risk that the children could end up with strangers rather than in kinship foster care.

177. Roberts, *supra* note 36, at 1621.

178. *E.g.*, Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 959-61 (1991) (describing welfare policies relating to single mothers as "social control" of those women and their families).

179. *See* McGrath, *supra* note 95, at 655-60 (describing parents' distrust of and "feeling of vulnerability" in the face of CPS authority).

180. *See* ANNIE E. CASEY FOUND., *supra* note 13, at 18; *see also* Coupet, *supra* note 150, at 1259; McGrath, *supra* note 95, at 655-60; Dorothy E. Roberts, Essay, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 892-93 (2007).

181. *E.g.*, D.C. MUN. REGS. tit. 29, §§ 6005.2-.3, 6007.16-.22 (2019).

182. When an adult applies for a license to be a foster parent in the formal foster care system, all adults in their home must submit to criminal background checks, and rules prohibit foster care licenses based on certain convictions, including any felony drug conviction within the past five years, and require consideration of any other conviction. 42 U.S.C. § 671(a)(20)(A), (C) (2018). State and local licensing codes apply this federal requirement. *E.g.*, D.C. MUN. REGS. tit. 29, § 6008.

183. 42 U.S.C. § 671(a)(10)(D).

184. Indeed, some evidence suggests that state practice in granting kinship waivers of foster care licensing requirements varies widely. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON STATES' USE OF WAIVERS OF NON-SAFETY LICENSING STANDARDS FOR RELATIVE FOSTER FAMILY HOMES 5-7 (2011), https://perma.cc/DB8V-9K78 (reporting a widely varying frequency of CPS agencies granting waivers and the actual number of children placed in formal kinship foster care by state).

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A family court case and formal foster care bring with them certain other risks, which parents or children might choose over the risks of hidden foster care. The child's fate will be up to a judge—who may be more or less favorable to the parent than the agency. Removal into formal foster care also triggers a timeline that can lead to termination of parental rights; states are often required to seek such terminations when children have been in foster care for fifteen months.[185] Some state termination statutes authorize judges to permanently sever the legal relationship between parents and children if the problem leading to removal is not rectified on an even shorter timeline.[186]

B. Risks of Hidden Foster Care

Formal kinship foster care requires several steps that trigger family court involvement, due process protections, and CPS agency support to and oversight of kinship caregivers.[187] In such cases, a CPS agency files a petition alleging parents have abused or neglected their children, and convinces family courts both that the petition is accurate and that the court should order that custody of the children be transferred to the CPS agency.[188] The agency then, in the language of federal child welfare financing statutes, has "placement and care" authority over the child.[189] When the agency has identified a kinship caregiver with whom it wishes to place the child, it can grant that caregiver a foster home license and place the child in that home.[190] The agency then has a set of court-supervised obligations to affected children, parents, and kinship caregivers. The agency must provide services to help the parent and child reunify.[191] The agency pays the kinship caregivers a foster parent subsidy (as it does to any unrelated licensed foster parent), provides social work case management and other services to the child, and oversees the placement to

185. *See* 42 U.S.C. § 675(5)(E).

186. *See, e.g.*, S.C. CODE ANN. § 63-7-2570(2) (2019) (providing a six-month timeline).

187. For a summary of the procedures triggered by formal kinship foster care, compared with the absence of such procedures in hidden foster care, see LEGISLATIVE AUDIT COUNCIL, S.C. GEN. ASSEMBLY, A REVIEW OF CHILD WELFARE SERVICES AT THE DEPARTMENT OF SOCIAL SERVICES 53-56 (2014), https://perma.cc/7VGS-SUNG.

188. The Constitution requires states to give parents hearings on their fitness before removing their children. Stanley v. Illinois, 405 U.S. 645, 649 (1972). States have codified these requirements. *E.g.*, S.C. CODE ANN. § 63-7-1660(A)-(E) (describing the process for filing and adjudicating petitions alleging abuse or neglect).

189. 42 U.S.C. § 672(a)(2)(B).

190. *E.g.*, S.C. CODE ANN. § 63-7-2320 (describing kinship foster home licensing).

191. *See* 42 U.S.C. § 671(a)(15)(B)(ii).

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ensure it meets the child's needs.[192] The family court holds regular hearings until the child has a permanent legal status—either by reunifying with parents or by forming new permanent legal connections with a family through permanent guardianship or adoption.[193]

All of those steps are missing from hidden foster care. This Subpart will outline distinct policy concerns with the use of hidden foster care expressed both by advocates for less state intervention in families and advocates for greater intervention, as well as by advocates for kinship caregivers. In so doing, this Subpart will also argue that advocates of different stripes all raise legitimate concerns, as do those who argue that hidden foster care has benefits in at least some cases. That nuanced view underscores the need for regulation and the specific proposals in Part VI.

1. Denial of court oversight

The absence of court oversight raises multiple significant concerns—both the due process concerns discussed in Part II and several overlapping policy concerns.

First, avoiding court proceedings removes an important opportunity to provide a check on unnecessary removals. Hidden foster care happens when CPS officials determine children cannot remain safely in their homes, and they then catalyze a change in physical custody. There is good reason to think that CPS officials often incorrectly determine a change in physical custody is necessary and, absent court hearings to check such decisions, children are unnecessarily separated from their parents. The most analogous decision in the formal foster care system is whether CPS officials should remove children and initiate court proceedings, and existing research demonstrates that CPS agencies remove a large number of children only for them to return home in a matter of days.[194] Studying this phenomenon, Vivek Sankaran and Christopher Church conclude many of these children should never have been removed at all.[195] Frequent errors in initial removal decisions have been documented in

192. *See id.* § 672(a)(1) (providing payments to licensed foster homes); *id.* § 675(1)(B) (establishing "case plan" requirements, including providing "services . . . to the parents, child, and foster parents").

193. *See id.* § 675(5).

194. *See* Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 216-26 (2016).

195. *Id.* at 210. Sankaran and Church also question the effectiveness of family court checks on agency removal. *Id.* While those checks could be strengthened, they are nevertheless superior to the total absence of judicial checks as occurs in hidden foster care.

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multiple jurisdictions.[196] The decision that a child has to be separated from a parent is ripe for inaccuracy—it requires balancing multiple complex factors, but typically must be made with incomplete and imperfect information.[197] It is thus unsurprising that errors related to hidden foster care are evident in some court decisions.[198]

Recognizing the existence of such errors is essential for due process analysis. Even those circuits rejecting due process concerns with safety plans do so on the premise that CPS agencies must have a factual and legal basis for the threat to remove the child or file a case asking a family court to order a removal.[199] Recognizing a significant risk that CPS agencies may make errors in determining when they can lawfully threaten to remove a child should lead to significant skepticism about endorsing that practice without some judicial check. In practice, CPS caseworkers often make that judgment on their own—perhaps in consultation with a supervisor, but without any consultation with a lawyer. Consider, for instance, the South Carolina CPS agency's policy

196. *See, e.g.*, Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382, 384, 388-91 (2019) (describing such errors and attorneys' success in correcting them, leading to prompt reversals of child removals); Kathleen B. Simon, Note, *Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review*, 51 COLUM. J.L. & SOC. PROBS. 347, 358-59 (2018) (describing such findings in the District of Columbia); Ark. Div. of Children & Family Servs., Title IV-E Waiver Demonstration Project Proposal (2012) (on file with author) (acknowledging that many children who enter and leave foster care quickly "should have never come into care" in the first place).

197. *See* Simon, *supra* note 196, at 361.

198. *See, e.g.*, Schulkers v. Kammer, 367 F. Supp. 3d 626, 639-40 (E.D. Ky. 2019) (describing a CPS agency's threat to remove a child if the parents did not agree to a safety plan as unsupported by facts and contrary to legal standards), *aff'd in part, rev'd in part*, No. 19-5208, 2020 WL 1502446 (6th Cir. Mar. 30, 2020). As an illustration, consider *South Carolina Department of Social Services v. Wiseman*, 825 S.E.2d 74 (S.C. Ct. App. 2019). In that case, the CPS agency found no evidence to support physical abuse allegations. *Id.* at 75. Nonetheless, the CPS caseworker testified that upon the child's release from a psychiatric hospital, the agency "would have asked for relative placement until the agency was able to complete its investigation." *Id.* at 77. The court ruled that the parents had not maltreated their child, *id.* at 76-77; as a result, insistence on a temporary informal relative placement would not have been justified, *see* S.C. CODE ANN. § 63-7-1660(E) (2019) (requiring a finding that the child was mistreated before ordering a child removed from the parents' custody).

199. *See, e.g.*, *supra* notes 119-22 and accompanying text. The Seventh Circuit noted that a trial on the "administration of the safety plans"—not a facial challenge to their use—had not yet occurred, and evidence of "misrepresentations or other improper means" by CPS officials had not yet been produced. Dupuy v. Samuels, 465 F.3d 757, 763 (7th Cir. 2006). In one later case, the Seventh Circuit applied the rule stated in *Dupuy*, ruling that the state CPS agency may have violated a family's constitutional rights when it allegedly insisted that parents sign a safety plan when it lacked legal authority to keep the child in its custody. *See* Hernandez v. Foster, 657 F.3d 463, 482-84 (7th Cir. 2011).

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manual. It requires caseworkers to consult with agency attorneys only when they are preparing to file a petition, thus preventing any legal advice, even by the agency's own counsel, to caseworkers before they threaten to remove children.[200] Parents also generally lack counsel to advise them or challenge the caseworker on the legal basis of the threat. Thus, all parties involved are flying blind on an essential legal foundation of safety plans.

Second, due process checks in a court proceeding can provide a modest correction to racial and economic disparities within the child protection system and help limit the contribution of racial stereotypes or implicit or explicit biases to removal decisions. A central concern regarding those disparities is that high levels of discretion can permit implicit biases based on race, class, sex, disability, or other characteristics to infect decisions—a particularly significant concern given the imperfect information often available.[201] Racial disparities are particularly pronounced at these initial stages of a case,[202] indicating a particular need for vigilance. Unchecked decisions can have more disparities; Kathleen Simon concluded that reducing individual removal discretion by limiting circumstances in which emergency removals are permitted, and thus strengthening judicial review of postremoval decisions, was correlated with reductions in racial disparities in removals.[203]

Third, court proceedings trigger statutory right-to-counsel laws in child protection cases, ensuring the parents will have an attorney to aid them, not only in challenging the state's evidence but also in negotiating temporary or permanent arrangements with CPS agencies and in advocating for prompt reunifications.[204]

2. Denial of reasonable efforts to reunify

The child protection system is intended to be rehabilitative—even when the state must remove children from their parents, the law presumes reunifying children with their parents will serve their best interest, and, indeed, reunification

200. *Compare* S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 718 (requiring DSS attorney reviews before initiating family court proceedings), *with id.* § 719.02 (making no reference to legal review or consultation when initiating safety plans).

201. *See* Simon, *supra* note 196, at 362-63.

202. *See id.* at 354-55; *see also* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERV., ISSUE BRIEF: RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 9 (2016), https://perma.cc/DC9K-XFUF.

203. *See* Simon, *supra* note 196, at 375-85.

204. Most states provide parents with a categorical right to counsel, and the remainder provide a discretionary or qualified right to counsel. *See Status Map*, NAT'L COALITION FOR CIV. RIGHT TO COUNS., https://perma.cc/UD92-SL28 (archived Feb. 12, 2020).

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is the most common means by which children leave foster care.[205] But hidden foster care exempts agencies from the core legal requirements to meet this rehabilitative goal.

Child protection law furthers reunification through two core requirements: first, that agencies make "reasonable efforts" to reunify parents and children;[206] and second, that agencies work with families to develop individualized case plans to aid rehabilitation and reunification.[207] If a state removes a child due to concerns arising from a parent's substance abuse, a parent's untreated mental health condition, or a parent's abusive partner, then the state must work to connect the parent to appropriate services or find a way to protect the child from the abusive partner so that the parent and child can reunite.[208] Some states have provided more explicit guidance.[209]

Crucially, the legal obligation to help reunite parents with their children is triggered by placing children in foster care—thus, agencies avoid it by using hidden foster care. Agencies must also make reasonable efforts to avoid removing children from their parents,[210] but that obligation is only adjudicated if the agency brings the case to court, which an agency relying on hidden foster care need not do. As at least one CPS agency has acknowledged explicitly, using hidden foster care means the agency "has no further legal obligation to the parent in terms of reunification."[211]

In addition, when agencies bring a case to court and place a child in formal foster care, they must craft case plans that include details of services to parents "to improve the conditions in the parents' home [and] facilitate return of the child."[212] Case plans must describe "the appropriateness of and necessity for the foster care placement."[213] Procedurally, CPS agencies must "develop[] [case

205. About half of all children leaving foster care do so via reunification. The next most frequent outcome—adoption—accounts for 24% of children leaving foster care. CHILDREN'S BUREAU, *supra* note 16, at 3.

206. 42 U.S.C. § 671(a)(15)(B)(ii) (2018). Narrow exceptions to this requirement apply. *See id.* § 671(a)(15)(D).

207. *Id.* §§ 671(a)(16), 675(1).

208. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 2 (2019), https://perma.cc/YQJ7-M2MY (describing common examples of reasonable efforts).

209. *See, e.g.*, D.C. CODE § 4-1301.02 (2019) (enumerating specific services as examples of reasonable efforts); 325 ILL. COMP. STAT. 5/8.2 (2019) (same); S.C. CODE ANN. § 63-7-1640(A)(2) (2019) (requiring the CPS agency to ensure parents with disabilities receive services tailored to their needs and abilities).

210. 42 U.S.C. § 671(a)(15)(B)(i).

211. VA. DEP'T OF SOC. SERVS., *supra* note 89, at 5.

212. 42 U.S.C. §§ 671(a)(16), 675(1)(B).

213. *See* 45 C.F.R. § 1356.21(g) (2019).

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plans] jointly with the parent(s) or guardian of the child."[214] Some state laws provide further due process checks by requiring family courts to approve case plans and providing for specific roles for parents and sometimes their attorneys,[215] as well as by adding substantive details to the types of services that ought to be listed.[216] These requirements, including the opportunity to bring disputes to court, are not triggered when CPS agencies do not remove children or file abuse or neglect petitions against their parents.

The loss of these two critical protections—reasonable efforts to reunify and case planning obligations—is particularly acute when hidden foster care lasts longer than a few days. Then the invasion of family integrity becomes even more severe, and the need for a meaningful plan to resolve the case even more important. When such separations are triggered by real concerns about parents' ability to raise their children, rehabilitation is crucial to address those concerns. But the legal status of hidden foster care permits a CPS agency to treat the case as lower priority—there is no legal obligation for the state to develop a detailed case plan or provide rehabilitative services, and there is no pending court hearing to prepare for and thus no moment when a judge will question the agency's efforts to prevent removal or reunify the child with their parents.[217] Moreover, the agency may perceive the child as stable in the kinship caregiver's home and thus deprioritize the case relative to others with more pressing concerns.

The loss of reasonable efforts to reunify and related case planning duties is even more acute when hidden foster care leads to long-term changes in children's custody, as it did in more than 60% of hidden foster care cases studied in Texas—covering about 21,000 children in one year.[218] It is reasonable to wonder how many of those children and their parents might have been reunified had these legal obligations applied.

214. *Id.* § 1356.21(g)(1).

215. *E.g.*, N.M. STAT. ANN. § 32A-3B-15(A), (C) (West 2019) (requiring the development of case plans and the dissemination of such plans to all parties before a disposition hearing); OKLA. STAT. tit. 10A, § 1-4-704(C) (2019) (requiring CPS agencies to obtain signatures from parties and their counsel and creating court procedures to challenge elements of case plans); UTAH CODE ANN. § 62A-4a-205(1)-(4) (LexisNexis 2019) (requiring the involvement of parents and others in developing case plans and informing courts of disagreements regarding their contents).

216. *E.g.*, N.M. STAT. ANN. § 32A-3B-15(B); OKLA. STAT. tit. 10A, § 1-4-704(D)-(E); UTAH CODE ANN. § 62A-4a-205(6).

217. *See* Pearson, *supra* note 14, at 848.

218. *See supra* text accompanying notes 63-64.

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3. Denial of services and financial support to kinship families

Much criticism of hidden foster care involves concerns about how it enables CPS agencies to avoid providing financial and other services to kinship caregivers that would be available were CPS agencies to take a more formal route.[219] These critiques include calls for CPS agencies to enhance services and financial support to kinship caregivers.[220] Critics also worry that CPS agencies' use of hidden foster care is "motivated . . . by budget deficits and the desire to keep foster care numbers low."[221]

The most prominent illustration of this concern is how hidden foster care enables CPS agencies to avoid their obligations to kinship caregivers in the formal foster care system, particularly the provision of foster care maintenance payments. The absence of such payments raises a particular concern that CPS agencies are failing to support kinship caregivers (and children in their homes) who in the aggregate tend to have lower incomes than nonkinship foster parents.[222] Hidden foster care thus denies financial assistance to families who, in general, are most likely to need it. Kinship caregivers in these situations have raised concerns about the absence of both foster care subsidies and related services—such as automatically provided Medicaid cards and vouchers for furniture and clothing to help take care of children.[223] Other child welfare services are also often available only to children in formal foster care (kinship or otherwise) but not children in hidden foster care—including respite care[224]

219. *See* Ehrle et al., *supra* note 80, at 2 ("Many children in kinship foster care, therefore, may not be receiving the services needed to ensure the safety of their placements."); Walsh, *supra* note 78, at 2 ("Our findings point to the need to develop ways to better support informal kin, especially among very poor households. . . . [K]in caregivers . . . are less likely to receive services, including financial assistance, than other types of substitute caregivers."); *see also* Jill Duerr Berrick, *Trends and Issues in the U.S. Child Welfare System*, *in* CHILD PROTECTION SYSTEMS: INTERNATIONAL TRENDS AND ORIENTATIONS 17, 30 (Neil Gilbert et al. eds., 2011) (describing the "two-tiered system" of care caused by "voluntary kinship care"); Coupet, *supra* note 150, at 1256 (noting that kinship caregivers who take custody through hidden foster care "are deprived of all of the support, services, and therapeutic resources that foster parents of children who are adjudicated dependent would receive").

220. *See, e.g.*, Lee et al., *supra* note 85, at 105-06.

221. ANNIE E. CASEY FOUND., *supra* note 13, at 7. Part IV will discuss in more detail financial incentives for agencies to use hidden foster care.

222. *See* Riehl & Shuman, *supra* note 56, at 109, 111. This concern has attracted some media attention. *See, e.g.*, Katie O'Connor, *"They Forgot About Us:" Thousands of Families Are Doing the Same Work as Foster Parents in Virginia, Without the Support*, VA. MERCURY (June 2, 2019), https://perma.cc/U4N2-UUQB.

223. *See* Ofelia Casillas & Dahleen Glanton, *Is DCFS Diverting Cases to Save Costs?*, CHI. TRIB. (Apr. 5, 2010), https://perma.cc/D3HQ-EF52.

224. *See* Roberts, *supra* note 36, at 1631 (noting that respite care "is often subsidized by the state for foster parents").

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or assistance with transportation to school.[225] The absence of a change in legal custody can also raise questions about kinship caregivers' authority to make health care, educational, or other decisions for children in their homes.

Defenders of hidden foster care justify denying these financial supports because hidden foster care cases involve kinship caregivers, arguing that people should take care of their kin "without compensation."[226] Indeed, the wide scope of hidden foster care seems to suggest that states do not need to pay kinship caregivers direct subsidies to recruit them to take care of their relatives. The ability to recruit kinship caregivers is a different matter, however, than the needs of those caregivers to provide for children brought into their home through CPS agency action. Moreover, the purpose of foster care maintenance payments as established by Congress and described by the Supreme Court focuses on children's needs, not perceived kinship duties.[227] That legal standard asks what financial and other supports are necessary to help raise a child, especially a child who may have been traumatized by past abuse or neglect or by the CPS-induced move to live with kin.

4. Potential safety risks to children of hidden foster care

Hidden foster care can also leave children in danger that the formal foster care system could mitigate. Kinship foster families typically facilitate more informal visitation between parents and children than does placement with strangers.[228] That is normally a good thing, but it can be dangerous when parents are dangerous to children. Family court and agency oversight of kinship foster homes can help protect against such dangers in formal kinship care cases through visitation orders and oversight of kinship placements—steps absent in hidden foster care cases.[229] Moreover, hidden foster care does not involve any change in legal custody, so a parent has every legal right to take the child at any time. When parents pose an immediate physical danger to children, hidden foster care provides at most weak protection.

Moreover, hidden foster care may lead CPS agencies to approve children living with kin who could provide an unsafe home. Think tanks that have surveyed caseworkers found a dearth of policies regarding how to determine the safety of potential kinship homes and "inconsistent" guidance to individual caseworkers.[230] Surveys of CPS state agencies reveal that most, but not all,

225. *See* 42 U.S.C. § 675(4)(A) (2018) (making federal financial assistance available for foster children to obtain transportation to school).

226. ANNIE E. CASEY FOUND., *supra* note 13, at 5-6.

227. *See infra* text accompanying notes 266-69.

228. Riehl & Shuman, *supra* note 56, at 110.

229. LEGISLATIVE AUDIT COUNCIL, *supra* note 187, at 53-56.

230. MALM & ALLEN, *supra* note 39, at 4.

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require kinship caregivers to undergo a background check, but this is less than a full kinship licensing assessment.[231] Overly rigid rules could screen out perfectly safe kinship caregivers, but removing too many safety checks could leave children vulnerable to further maltreatment.

Given these concerns, Elizabeth Bartholet—an advocate for more state intervention to protect children who opposes more family preservation efforts—has written critically of the "stunning" scope of hidden foster care and its possible harmful results.[232] "Surely a child-friendly system would question such a massive diversion program and insist at a minimum on research assessing how children do in such informal, uncompensated, and unsupervised kinship care as compared to formal foster care."[233] Other critics have raised concerns that the more modest assessment of informal kinship caregivers (compared with kinship foster caregivers) may lead "[o]verworked agents [to] save time and resources by placing children with relatives" outside of foster care and court oversight.[234] These concerns are reflected in data from Texas's hidden foster care system. Texas authorities found that when they closed hidden foster care cases with children still living with kinship caregivers who lacked legal custody, children were deemed to be victims of later abuse or neglect at higher rates than other children in kinship placements.[235]

IV. Follow the Money: Federal Funding and Perverse Incentives

Effectively regulating hidden foster care requires an understanding of the existing federal funding structures and how they create incentives for state CPS agencies to use the practice. Many of the practices that CPS agencies avoid by using hidden foster care[236] are connected to federal child protection funding and, more specifically, requirements states must meet to access that funding. This Part will explore how the federal child protection funding system contained in Title IV-E of the Social Security Act[237] (known in the field simply as "Title IV-E") creates a perverse incentive to avoid all of these costs. Under our existing federal funding scheme, hidden foster care allows CPS agencies to effectuate the change of children's custody from parents to kinship caregivers on the cheap.

231. ALLEN ET AL., *supra* note 67, at 13.

232. *See* Bartholet, *supra* note 15, at 1367.

233. *Id.*

234. Naomi Schaefer Riley, *Reconsidering Kinship Care*, NAT'L AFF. (Summer 2018), https://perma.cc/Q9B9-PAR8.

235. CHILDREN'S COMM'N, *supra* note 63, at 13.

236. *See supra* Part III.B.

237. 42 U.S.C. §§ 670-679c (2018).

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In explaining the incentives to use hidden foster care, this Part offers an adjustment to the occasional claim that the federal financing system "encourage[s] agencies to separate families" through formal foster care.[238] Federal funding structures provide *partial* federal reimbursement to state CPS agencies for the costs of providing for children in foster care and thus make foster care cheaper for states than it otherwise would be and, more specifically, make foster care for Title IV-E-eligible families—that is, poor families[239]—less expensive than it is for ineligible families. Nonetheless, there is a difference between making foster care less expensive and making it more financially appealing than other options; foster care remains an expensive enterprise, so avoiding foster care altogether remains cheaper for state agencies. While much could be said to critique foster care financing policies—for instance, that these policies make it cheaper to remove poor children, support too many services for children in foster care rather than services to prevent abuse and neglect, or otherwise prevent the need for foster care—the financial incentives remain to avoid foster care, especially because Title IV-E requires states to take on certain expenses when they use formal foster care. CPS agencies thus have strong financial incentives to use hidden foster care—they do not need to pay foster care subsidies and do not need to provide as many services to children and families.[240]

238. Simon, *supra* note 196, at 360; *see also* Pimentel, *supra* note 54, at 271 ("The greatest incentive for CPS to remove children is the resulting financial benefit associated with foster care under [Title IV-E].").

239. For the state to be eligible to receive Title IV-E funds in individual foster care cases, the child removed by the state and placed in foster care must be from a family that would have been eligible for Aid to Families with Dependent Children (AFDC), as it existed in 1996 before welfare reform (which converted AFDC into Temporary Aid to Needy Families) took effect. *See* 42 U.S.C. § 672(a)(3).

240. A related issue is whether hidden foster care could absolve state agencies from liability if children faced harm in kinship care. When the state takes custody of a person, that triggers a constitutional obligation "to assume some responsibility for his safety and general well-being." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989). CPS agencies could plausibly argue that because they do not take legal custody of a child in hidden foster care, this practice does not trigger such liability. If accurate, that would add an additional financial and legal incentive to use that practice. However, CPS agencies likely *would* be liable even in hidden foster care cases because the state role in arranging hidden foster care placements could be viewed as a state-created danger; if a kinship placement in hidden foster care creates a danger for the child, the state created the danger by arranging the placement. *See* Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996); *see also DeShaney*, 489 U.S. at 198-201 (distinguishing cases in which the state had a role in the "creation" of dangers); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."). A full analysis of whether the frequently applied test for determining if a state-created danger exists, *e.g.*, *Kneipp*, 95 F.3d at 1208-09, is met in hidden foster care cases is beyond the scope of this Article.

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A. Child Welfare Federal Financing Overview

Removing children and placing them in foster care triggers a range of costs to states: payments to foster parents to take care of the children, services for the children and their parents to facilitate reunification, and costs associated with court hearings to adjudicate CPS agency petitions alleging abuse and neglect and obtain a court order changing custody to the agency.[241] A partial accounting of these costs—including payments to foster parents and some services for children in addition to agency administrative costs, but excluding reunification services for parents—reveals an average annual cost of more than $25,000 per child in foster care.[242]

The federal government partially reimburses state CPS agencies for many of these costs through Title IV-E. That exercise of federal spending power accounts for a significant proportion of child protection spending—federal spending accounts for about 45% of overall child protection spending (nearly $13 billion annually), and Title IV-E accounts for the largest share of that federal funding (about $6.5 billion annually).[243] This substantial federal financial commitment provides the federal government—both Congress and the Children's Bureau, a subdivision of the Department of Health and Human Services that administers child welfare funding—substantial influence over state child welfare policy decisions.

Importantly, Title IV-E focuses largely on what happens *after* CPS agencies remove a child and open a court case—thus foster care is necessary to trigger most federal child protection funding as well as the conditions the federal government imposes on states to receive that money. In particular, Title IV-E requires states to pay foster care maintenance payments including subsidies to foster parents, offering partial federal reimbursement for those costs,[244] and requires states to operate a case review system including regular court hearings for foster children.[245] These obligations to kinship caregivers are triggered

241. Federal spending statutes require states to take these steps as a condition of receiving federal funding. *See* 42 U.S.C. § 672 (providing foster care maintenance payments); *id.* § 671(a)(15)(B) (conditioning those payments on "reasonable efforts" being made to "reunify families"); *id.* §§ 671(a)(16), 675(5)(B) (calling for a "case review system" including regular court reviews). Some steps are required as a matter of constitutional law: Due process requires states to provide parents with a hearing on their fitness before removing children. Stanley v. Illinois, 405 U.S. 645, 649 (1972).

242. Nicholas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption*, ADOPTION ADVOC. 3 (May 2011), https://perma.cc/PP67-7CCG.

243. Child Trends, How States Fund Child Welfare Activities 1 (2016), https://perma.cc/2BQA-75KF.

244. *See* 42 U.S.C. §§ 671(a)(1), 672(a).

245. States must hold court or administrative reviews at least every six months, *id.* § 675(5)(B), and court reviews at least every twelve months, *id.* § 675(5)(C).

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by transferring "placement and care . . . responsibility" to a state child welfare agency.[246] In contrast, if children remain in a kinship caregiver's informal custody via a safety plan, then these obligations do not exist. In addition to these substantive obligations triggered by removing children and placing them in formal foster care, Title IV-E imposes administrative requirements on CPS agencies—at least when they use formal foster care.[247]

In 2018, Congress acted to permit states greater flexibility in using federal funds to prevent the need for foster care rather than insisting that CPS agencies go to court and remove children. The Family First Prevention Services Act, discussed in more detail below, provides states that meet certain conditions the ability to use Title IV-E funds for prevention efforts.[248] This Article will discuss whether Congress's means of achieving that goal risk incentivizing greater use of hidden foster care.[249]

Congress's action responded to concern that Title IV-E focused too much on foster care spending and not enough on prevention of abuse or neglect, or on alternatives to foster care. Some have even suggested that Title IV-E federal funding incentivized removing children.[250] That overstates the financial dynamic. Title IV-E provides federal funding only for eligible children[251]—and only about half of children in foster care are eligible.[252] Moreover, even for eligible children, federal funds only cover a portion of costs.[253] The costs of foster care, however, generally apply to all children in the formal system; states provide foster care maintenance payments to families even if they do not qualify for Title IV-E reimbursement.[254] Thus, on average, state and local CPS agencies still

246. *Id.* § 672(a)(2)(B).

247. *See supra* notes 73-74 and accompanying text.

248. *See infra* Part V.A.2.

249. *See infra* Part V.A.2.

250. *E.g.*, Simon, *supra* note 196, at 360-61.

251. *See* 42 U.S.C. § 672(a)-(b).

252. KRISTINA ROSINSKY & SARAH CATHERINE WILLIAMS, CHILD TRENDS, CHILD WELFARE FINANCING SFY 2016: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 16 (2018), https://perma.cc/7LY9-ZBVH.

253. The state-specific percentage covered by the federal government and by each state is calculated by the same formula used to calculate federal Medicaid funding to states. 42 U.S.C. § 674(a)(1) (citing 42 U.S.C. § 1396d(b)). That formula varies between 50% and 83% federal reimbursement, determined by the state's relative wealth as measured by its per capita income, such that poor states receive a higher federal reimbursement rate than rich states. *Id.* § 1396d(b) (cited in 42 U.S.C. § 674(a)(1)).

254. *See, e.g.*, D.C. CHILD & FAMILY SERVS. AGENCY, RESOURCE PARENT HANDBOOK: WHAT RESOURCE PARENTS SHOULD KNOW BEFORE A CHILD IS PLACED IN THEIR CARE AND HOME 93-95 (2018), https://perma.cc/6T9D-QFXC (describing foster care board rates and their calculation without reference to Title IV-E eligibility).

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bear the majority—57%, according to a recent estimate—of total costs for foster care.[255]

B. *Miller v. Youakim* and Payments in Formal Foster Care

Title IV-E's incentives for states to avoid formal kinship foster care's costs are ironically strengthened by case law limiting states' efforts to provide less financial support to formal kinship foster families than to stranger foster families. CPS agencies had long sought to arrange for formal kinship foster care at low cost—that is, without paying the same subsidies that agencies pay nonkinship foster parents. The Supreme Court rejected these efforts in 1979 in *Miller v. Youakim*, insisting that CPS agencies pay kinship and nonkinship foster homes the same subsidies.[256] While the Court was right on the statutory interpretation question and right to push against state efforts to provide formal kinship foster care on the cheap, this decision made the difference between formal kinship foster care and hidden foster care even greater. *Miller* thus strengthened a perverse incentive: The only way for CPS agencies to avoid paying kinship caregivers is to avoid licensing them as foster parents.

Miller v. Youakim challenged an Illinois policy that excluded children living with related foster parents from the state's foster care funding.[257] The state CPS agency placed two foster children with their adult sister and her husband, Linda and Marcel Youakim, after determining that the Youakims' home met state foster home licensing standards.[258] The agency had previously placed the children in nonkinship foster homes and paid $105 per month per child to the foster care providers.[259] But when it moved the children to the Youakims, it refused to pay the same rate, asserting that because theirs was a kinship placement, it did not count as foster care, citing an Illinois law definition of a "foster family home" as limited to adults providing a home to children who were not related.[260] The state did pay the Youakims $63 per child per month in welfare benefits—40% less than the state paid nonkinship foster parents.[261]

The Supreme Court held that the federal funding statute prevented states from treating kinship foster families differently from other foster families.[262]

255. ROSINSKY & WILLIAMS, *supra* note 252, at 4.

256. 440 U.S. 125, 145-46 (1979).

257. *Id.* at 126-27.

258. *Id.* at 129-30.

259. *Id.* at 130.

260. *Id.* at 130-31.

261. *See id.* at 131.

262. *Id.* at 133.

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The federal statutory definition of "foster family home" made no mention of the kinship status of any foster family, requiring only that the CPS agency license their home.[263] Other provisions of the statute required states to pay foster care maintenance payments for children "in the foster family home *of any individual*," providing no distinction between kinship and nonkinship foster care.[264] The conclusion is straightforward—once a state gave foster care licenses to kinship caregivers and placed children with those caregivers following a family court order to remove the children from their parents,[265] the state had to pay kinship caregivers the full foster care subsidy.

The *Miller* Court envisioned a foster care system in which any time a child needed to be removed from their parents, the state would financially support whomever it placed the child with via foster care payments commensurate with the child's anticipated needs, and all such removals would be reviewed by a family court judge to provide a meaningful due process check. That is, the Court emphasized the importance of two features of kinship foster care that are lacking in hidden foster care.

Miller also described foster care maintenance as payments to meet children's needs rather than based on any perceived obligation that family members could have toward children in their extended family.[266] The Court emphasized Congress's determination that trauma endured by children in foster care led to a "need for additional . . . resources—both monetary and service related—to provide a proper remedial environment" for abused and neglected children.[267] That is why Congress increased the payments for foster children above those made via welfare payments—"to meet the special needs of neglected children[, which] cost more than basic . . . care."[268] This view of foster care maintenance payments has been strengthened in the intervening years as Congress has defined foster care maintenance payments as those necessary to pay for a list of needs of children in foster care.[269] Foster care maintenance payments exist, therefore, to meet the presumptively significant needs of foster children. They do not exist to provide financial incentives to recruit foster parents. If it were the latter, one could justify (at least on policy grounds) paying a lower rate to kinship foster parents, who largely agree to take in a

263. *Id.* at 135 (citing 42 U.S.C. § 608 (1976)).

264. *Id.* (citing 42 U.S.C. § 608(b)(1) (1976)).

265. *Miller* made clear that these other criteria were necessary to trigger a state's obligation to pay foster care maintenance payments. *See id.* at 134-35.

266. *See id.* at 138-45.

267. *Id.* at 145.

268. *Id.* at 143.

269. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, sec. 101(a)(1), § 475(4), 94 Stat. 500, 510 (codified as amended at 42 U.S.C. § 675(4)(A) (2018)).

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child because of their already existing relationship with the child or the child's parent and thus may need less of a financial incentive to agree to take that step.

The *Miller* Court also emphasized the essential role of judicial findings in justifying removing children from parents and placing them with anyone else—and it presciently feared that permitting states to treat kinship foster families differently from nonkinship foster families could erode this essential due process check. The federal foster care financing system required judicial approval before states could make (and seek partial federal reimbursement for) foster care maintenance payments.[270] But if states could exclude kinship placements from those requirements, the Court feared

> the State would have no obligation to justify its removal of a dependent child if he were placed with relatives, since the child could not be eligible for Foster Care benefits. But the same child, placed in unrelated facilities, would be entitled under the Foster Care program to a judicial determination of neglect. The rights of allegedly abused children and their guardians would thus depend on the happenstance of where they are placed . . . .[271]

All children—even those placed with kin—deserve "protect[ion] from unnecessary removal."[272]

The irony of *Miller v. Youakim*, therefore, is that its decision rested precisely on the concerns triggered by states' use of hidden foster care. At the same time, by rejecting states' efforts to make formal kinship care less expensive than foster care, *Miller* strengthened the distinction between informal and formal kinship care and thus created stronger financial incentives for states to use informal arrangements.[273]

Given those incentives, it is not surprising that *Miller* did not lead Illinois to treat kinship caregivers equally to nonkinship foster parents. Indeed, Illinois—the state whose discrimination against kinship foster placements the Court rejected in *Miller*—today offers a leading example of prevalent hidden foster care. It is the state that gave rise to the *Dupuy* litigation, and its frequent use of hidden foster care has been documented in the years after *Miller*.[274]

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270. *See Miller*, 440 U.S. at 134, 139.

271. *Id.* at 139-40.

272. *Id.* at 140.

273. To be clear, I do not suggest that the Court decided *Miller* incorrectly; quite the contrary. Rather, I suggest that additional regulation of hidden foster care is necessary to prevent the apt fears that *Miller* articulated from continuing.

274. *See supra* text accompanying note 88. The *Chicago Tribune* documented at least a "handful" of probate court cases—which could shift custody from a parent to a kinship caregiver—involving families willing to state to a reporter that the CPS agency pushed them toward hidden foster care instead of filing a juvenile court case. Casillas & Glanton, *supra* note 223.

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One important issue related to *Miller v. Youakim* remains subject to inconsistent application around the country—whether kinship foster parents have a private right of action to enforce their right to equal treatment in federal court. Three circuits have ruled kinship foster parents do have a private right of action.[275] The Eighth Circuit, however, has taken a different path—holding that foster parents lack a private right of action to challenge the amount of foster care maintenance payments from the state.[276] Like *Miller*, the majority rule appears correct on the individual facts and in its application of the test for private rights of action,[277] but it risks strengthening incentives to avoid formal foster care altogether—states could avoid federal courts forcing them to pay equal foster care subsidies to kinship caregivers by arranging for the child to go to kin via hidden foster care.

C. Hidden Foster Care's Cost Advantages to State CPS Agencies

Families with hidden foster care cases are not entirely without state support. Two points, however, are essential for comparing this support with that of the formal foster care system. First, from the perspective of kinship caregiving families, the support is substantially less generous financially, as the facts of *Miller* illustrate. Kinship caregivers who have physical custody of children can obtain public benefits to help take care of those children through Temporary Aid to Needy Families (TANF).[278] While such benefits surely help, they are quite modest in comparison to foster care subsidies.[279] Thus, to kinship caregivers, there is a significant financial difference between informal kinship care through safety plans and formal kinship foster care through a family court action initiated by a CPS agency.

Second, from the perspective of state agencies, this federal support does not require a state match—that is, it is essentially free to state agencies, compared to any formal foster care intervention, which, as discussed above, requires sizable state matches. While federal funds only partially reimburse

275. *See* N.Y. State Citizens' Coal. for Children v. Poole, 922 F.3d 69, 74 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 956 (2020); D.O. v. Glisson, 847 F.3d 374, 378 (6th Cir. 2017); Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 977 (9th Cir. 2010).

276. *See* Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1203 (8th Cir. 2013).

277. That test, and a full analysis of the competing cases, is beyond the scope of this Article.

278. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., KINSHIP CAREGIVERS AND THE CHILD WELFARE SYSTEM 5, 10 (2016), https://perma.cc/VL9W-T7LM.

279. Roberts, *supra* note 36, at 1626-27. In Virginia, for instance, one kinship family receives $247 per month for two children, compared with potential foster care subsidies between $470 and $700 per child. O'Connor, *supra* note 222.

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states for foster care subsidies,[280] TANF funds come as federal block grants to states that do not require state matching funds for each new case, so adding a child in hidden foster care to the state's TANF rolls does not add to state costs.[281] So a CPS agency that steers a child into hidden foster care can also help that family obtain TANF benefits at no cost to the agency.

Worryingly, using TANF for kinship caregivers diverts TANF funds from other impoverished families. TANF block grants have a fixed value,[282] so allocating those funds is a zero-sum game; giving those funds to a kinship caregiver diminishes TANF funds available for all other purposes. That result is especially concerning given the availability of an alternative funding stream (Title IV-E) to at least partially support kinship caregivers who could be in the formal foster care system.[283]

* * *

Putting the pieces of child protection financing together reveals a clear fiscal conclusion: Formal kinship foster care is significantly more expensive for states than hidden foster care, so state CPS agencies have strong financial incentives to use hidden foster care. Going to family court and obtaining legal custody of a child triggers a range of costs to and legal obligations on CPS agencies. While federal funds will help CPS agencies pay those costs, those agencies will be left with significant financial obligations, possibly for a long time. In contrast, hidden foster care is cheaper overall (with no foster care subsidies or family court costs), and federal financing systems make it even cheaper for CPS agencies because no state funding is required for TANF grants to hidden foster care kinship caregivers.

States are conscious of these incentives—indeed, any rudimentary child protection agency budgeting process would account for these funding differences. And CPS agencies have explicitly noted the cost. Consider South Carolina, which, as noted above, frequently uses hidden foster care.[284] When a state

280. *See supra* notes 251-53 and accompanying text.

281. States do have a maintenance-of-effort requirement, which replaced a matching fund obligation. *See* GENE FALK, CONG. RESEARCH SERV., RL32748, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A PRIMER ON TANF FINANCING AND FEDERAL REQUIREMENTS 5-6 (2017), https://perma.cc/Y9CG-6WYD. States must therefore spend a certain amount of money on various TANF-related activities in order to access federal TANF block grants. This structure creates a different incentive in individual cases. Adding an individual child to the state's TANF rolls does not add new state costs: The state will have already arranged for its maintenance-of-efforts obligations, and no state matching funds will be required. That contrasts with using formal foster care, which, even if the child is eligible for Title IV-E, will trigger a requirement that the state pay matching funds. *See id.*

282. *See id.* at 4-5 (describing TANF block grants as "fixed," with only narrow exceptions).

283. *See supra* text accompanying note 243.

284. *See supra* notes 91-92 and accompanying text.

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legislative audit recommended eliminating hidden foster care and applying "similar oversight by the family court and [CPS agency]" whenever abuse or neglect leads CPS to facilitate a relative placement,[285] the CPS agency responded with a thinly veiled focus on costs and impacts on the state's bottom line: "Before mandating a probable cause hearing and court oversight for all alternative caregiver cases, the General Assembly should consider the impact on" the Department of Social Services.[286]

V. Institutionalizing Without Strongly Regulating Hidden Foster Care

Following legal developments since 2008, hidden foster care is now more institutionalized and financially supported than ever before—but is not significantly more regulated. In 2008, Congress added provisions to Title IV-E that both implicitly recognized the hidden foster care system and provided federal financial support for it. In 2018, Congress added further provisions more directly recognizing and funding hidden foster care. In the same time period, state efforts to codify the practice have grown. Recent statutory enactments provide, at most, minimal regulation of hidden foster care, so their greatest impact is to codify the practice. Similarly, some states have adopted policies that impose minimal limits on hidden foster care. The overall trend, therefore, is that new statutes and policies have institutionalized the practice without imposing much regulation on it.

A. Federal Statutes

Two federal funding statutes now provide financial support for state CPS agency action in hidden foster care cases.

1. 2008: Kinship navigator programs

Congress first recognized—however indirectly—hidden foster care when it created "kinship navigator" grants in 2008.[287] These grants were intended to help state CPS agencies connect kinship caregivers to non-Title IV-E services and supports outside of formal foster care and thus prevent the use of foster care.[288] These grants were explicitly for "children who are in, or *at risk of*

285. LEGISLATIVE AUDIT COUNCIL, *supra* note 187, at 56.

286. Letter from Amber E. Gillum, Acting State Dir., S.C. Dep't of Soc. Servs., to Perry K. Simpson, Dir., Legislative Audit Council 7 (Oct. 2, 2014), *reprinted in* LEGISLATIVE AUDIT COUNCIL, *supra* note 187, at 65.

287. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, sec. 102(a), § 427, 122 Stat. 3949, 3953-56 (codified as amended at 42 U.S.C. § 627 (2018)).

288. *See* 42 U.S.C. § 627(a)(1).

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entering, foster care."[289] With the vast majority of children in kinship care living outside of the formal foster care system, some kinship care advocates saw those grants as an opportunity to support children living with kin outside of family court jurisdiction, including through "diversion practices where child welfare services utilize kin as a nonfoster care resource."[290] These grants also served to address one (and only one) of the policy concerns discussed in Part III—the lack of support and services to support kinship caregivers.[291]

The statute creating these grants said nothing explicitly about hidden foster care. States have used kinship navigator grants to help connect kinship caregivers to TANF and other public benefits to help them take care of children informally in their care.[292] Some of these kinship caregivers had obtained physical custody of children with no CPS agency involvement and thus did not form part of hidden foster care.[293] But some kinship navigator programs explicitly sought to "place the children with suitable kin caregivers"—that is, operate a small hidden foster care system and use kinship navigator funds to help kinship caregivers after CPS agencies effectuated a change in custody to them.[294] Indeed, a study of the first states to receive kinship navigator grants identified three that focused on kinship caregivers outside of formal foster care—and grant-funded work in all three states included a

289. *Id.* § 627(a) (emphasis added).

290. Wallace & Lee, *supra* note 45, at 418-19.

291. *Id.*

292. *See, e.g.*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-PI-18-05, FISCAL YEAR 2018 FUNDING AVAILABLE FOR DEVELOPING, ENHANCING OR EVALUATING KINSHIP NAVIGATOR PROGRAMS 2 (2018), https://perma.cc/52WX-ZRUK (reporting that the Children's Bureau had funded twenty kinship navigator programs, including seven focusing specifically on "improving coordination between Child Welfare and Temporary Assistance to Needy Families (TANF) agencies to better support families providing kinship care"); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., SYNTHESIS OF FINDINGS: TITLE IV-E FLEXIBLE FUNDING; CHILD WELFARE WAIVER DEMONSTRATIONS 18 (2011), https://perma.cc/J7MH-NJKK (describing the efforts of the kinship navigator program in Ohio); JAMES BELL ASSOCS., FAMILY CONNECTION DISCRETIONARY GRANTS: 2009-FUNDED GRANTEES; CROSS-SITE EVALUATION REPORT—FINAL, at viii, 24 (2013), https://perma.cc/7BD7-XR5Q (reporting that kinship navigator programs provided "information and referral" regarding "existing programs and services to meet caregiver needs").

293. JAMES BELL ASSOCS., *supra* note 292, at 156 (describing the population served as including informal kinship caregivers with the "potential" of child welfare system involvement but who had not yet had such involvement).

294. *Id.* at 25. The impact of this practice is evident in the short time frame many kinship caregivers served by kinship navigator programs had had physical custody of children—nearly half in South Carolina, for instance, had been kinship caregivers for less than three months. *Id.*

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significant portion of children "diverted" from foster care to informal kinship care.[295]

Kinship navigator programs' wide eligibility standards also helped CPS agencies work with families involved in hidden foster care. CPS agencies could use federal kinship navigator funds for these purposes for any family, regardless whether the family would be otherwise eligible for Title IV-E services.[296] That broader eligibility enables CPS agencies to use the funds to serve families regardless of income, contrasting with Title IV-E support for formal kinship foster care, which is limited to children from families who meet very low poverty thresholds.[297] That contrast strengthens the financial incentives for CPS agencies to use hidden foster care: CPS agencies can get federal financial assistance for providing *any* child in hidden foster care with kinship navigator services, but receive federal support for only *some* children whom they place in formal kinship foster care.

This Article does not intend to criticize kinship navigator programs. Indeed, some evidence exists suggesting that they have both helped kinship caregivers obtain legal custody and reunified children with parents, rather than making them live in limbo with kinship caregivers, all while protecting children's safety.[298] Rather, this Article asserts that kinship navigator programs support hidden foster care without regulating that practice by providing a relatively easy and federally funded mechanism to better support kinship caregivers—with no corresponding requirement or support for efforts to address other concerns about hidden foster care. Virginia's experience illustrates this concern. Charged by the legislature with reviewing its hidden foster care practices, the state CPS agency noted the practice was "widespread" and raised concerns that the practice was sometimes implemented poorly.[299] But the agency's recommendations were all about better supporting kinship caregivers, including through the creation of a kinship navigator program.[300] The agency made no recommendations regarding how to ensure hidden foster

295. Gerard Wallace, Summary Article, *Diversion from Foster Care and Informal Kinship Families*, *in* KINSHIP NAVIGATORS: PROFILES OF FAMILY CONNECTIONS PROJECTS FROM 2012 TO 2015, at 113, 114-15 (Gerard Wallace et al. eds., 2015). Wallace is the program director of the kinship navigator program of one of those three states (New York). *NYS Kinship Care Staff*, N.Y. STATE KINSHIP NAVIGATOR, https://perma.cc/6YL7-VASC (archived Feb. 12, 2020).

296. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-PI-18-11, REQUIREMENTS FOR PARTICIPATING IN THE TITLE IV-E KINSHIP NAVIGATOR PROGRAM 3 (2018), https://perma.cc/759S-RGTT.

297. *See supra* note 239.

298. *See* JAMES BELL ASSOCS., *supra* note 292, at ix, 33-41.

299. VA. DEP'T OF SOC. SERVS., *supra* note 89, at 1, 4-5.

300. *See id.* at 2, 17-18.

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care was only used when necessary and was truly entered into voluntarily; nor did it require the agency to work to reunify families when using hidden foster care.[301]

2. 2018: The Family First Act

While Title IV-E funding primarily supports CPS agency actions *after* placing a child in foster care, the 2018 Family First Prevention Services Act seeks to provide financial support to state efforts to *prevent* the need for foster care placements by providing prevention services to children and families.[302] This essential reform rests on the recognition of the harms of removing children from their parents—as the federal Children's Bureau put it in 2018, "the trauma of unnecessary parent-child separation."[303] Unfortunately, the Family First Act provides funds to help states avoid foster care, even if states can do so without avoiding parent-child separations. This point is written into the statute's goals—funding is available for services "directly related to the safety, permanence, or well-being of the child *or* to preventing the child from entering foster care."[304]

The statute explicitly envisions avoiding formal foster care through kinship placements, and a review of the statute shows how it could be used to support state efforts to use hidden foster care to prevent a child from entering formal foster care. The Family First Act provides funding to CPS agencies to serve foster care "candidates"—children "at imminent risk of entering foster care" but "who can remain safely in the child's home *or in a kinship placement*"

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301. *See id.* at 2.

302. Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.); *id.* § 50702, 132 Stat. at 232 (codified at 42 U.S.C. § 622 note (2018)).

303. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-PI-18-09, STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 2 (2018), https://perma.cc/3PV2-VGTL. This view responds to well-documented harms of removing children from their families when a viable means of keeping the children with their families exists. *See, e.g.*, Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 748 (2008) (finding that children placed in foster care for any length of time were three times more likely to be arrested, convicted, and imprisoned as adults than were similarly at-risk children left with their parents); Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1607 (2007) (suggesting that children placed in foster care may have had higher delinquency rates, higher teen birth rates, and lower earnings than did similarly at-risk children left with their parents); *see also* Vivek Sankaran et al., *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1165-69 (2019) (collecting and summarizing studies demonstrating harms to children from removal).

304. Family First Prevention Services Act § 50711(a)(2), 132 Stat. at 232-33 (codified as amended at 42 U.S.C. § 671(e)(1)) (emphasis added).

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with some kind of prevention services.[305] Those services must be mental health or substance abuse treatment services or "in-home parent skill-based programs."[306] This could include a range of services relevant to hidden foster care cases—services to aid reunification with parents, services to help the child with a mental health or substance abuse condition (including mental health care to help the child adjust to their new living arrangements), and any assistance offered to the kinship caregivers to facilitate permanence.

So the Family First Act *could* lead to more reunification services in hidden foster care cases, addressing an important concern with present practice.[307] But the statute does not require states to make these efforts. CPS agencies could facilitate a change in physical custody through hidden foster care, provide the kinship caregiver with TANF support, and provide some kind of mental health service to the child or some kind of "parenting" skills program to the kinship caregiver.[308]

Other provisions of the Family First Act explicitly envision using federal funds to support children in hidden foster care, including the most extreme forms of the practice that effectuate permanent changes in custody. To access federal funds, a state agency must develop a "written prevention plan" for each child it seeks to keep out of foster care.[309] Those plans require agencies to "identify the foster care prevention strategy for the child so that the child may remain safely at home, *live temporarily with a kin caregiver until reunification can be safely achieved, or live permanently with a kin caregiver.*"[310] Congress thus explicitly envisioned that these new federal funds would be available to provide services to children and their family members when state action temporarily—or even permanently—changed their custody. The Family First Act contains no provision ensuring any such change of custody meets any

305. *Id.* § 50711(b), 132 Stat. at 240 (codified as amended at 42 U.S.C. § 675(13)) (emphasis added); *see also id.* § 50711(a)(2), 132 Stat. at 233 (codified as amended at 42 U.S.C. § 671(e)(2)(A)) (permitting states to use funding to support services to foster care candidates who "can remain safely at home *or in a kinship placement* with receipt of services or programs" (emphasis added)). CPS agencies must meet certain other conditions to access this funding. *Id.* § 50711(a)(2), 132 Stat. at 233-38 (codified as amended at 42 U.S.C. § 671(e)(4)-(5)).

306. *Id.* § 50711(a)(2), 132 Stat. at 232-33 (codified as amended at 42 U.S.C. § 671(e)(1)).

307. *See supra* Part III.B.2.

308. Indeed, discussion of how to implement Family First in one state that heavily uses hidden foster care has focused on more funding for kinship navigator programs so that they exist statewide. *See* O'Connor, *supra* note 222.

309. Family First Prevention Services Act § 50711(a)(2), 132 Stat. at 233-34 (codified as amended at 42 U.S.C. § 671(e)(4)(A)).

310. *Id.* § 50711(a)(2), 132 Stat. at 233 (codified as amended at 42 U.S.C. § 671(e)(4)(A)(i)(I)) (emphasis added).

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particular legal standard, or that states provide any specific due process protections before effectuating such a change in custody.

Moreover, the Family First Act creates a new performance measure that further incentivizes CPS agencies to use hidden foster care. Starting in 2021, the federal Children's Bureau must track the percentage of foster care candidates whom CPS agencies successfully keep out of foster care.[311] Given the Act's purpose of keeping children out of foster care, this seems like a reasonable data point. Yet Congress explicitly included "those [children] placed with a kin caregiver outside of foster care" as children to be counted as *not* entering foster care,[312] and Congress did not require states to report the number of foster care candidates who were successfully kept with their parents. Federal agency guidance for reporting data for children with "prevention plans" similarly omits any requirement to distinguish foster care candidates successfully kept in their homes from those moved through CPS action to informal kinship placements.[313] CPS agencies can thus make themselves look good to federal overseers by using hidden foster care—that practice will successfully keep children out of foster care and thus look like successful foster care prevention. Such actions will not, of course, involve successfully protecting family integrity—CPS agencies will still facilitate changes in children's custody.

B. State Codification and Minimal Regulation of Hidden Foster Care

Parallel to federal statutes institutionalizing and further incentivizing hidden foster care, several states have acted over the last decade to codify hidden foster care while imposing only modest regulations on it, if any at all.

A small number of states have enacted statutes to this effect. In 2014, the Illinois legislature passed a brief statute that added one paragraph regarding safety plans to its Children and Family Services Act, explicitly recognizing them in statute for the first time.[314] That law imposes minimal requirements on safety plans: They must be written and be signed by all parties including a parent or guardian, the "responsible adult caregiver" who is taking physical custody of the child, and a CPS representative.[315] CPS must provide all parties a copy of the plan, along with information on their legal rights, and must obtain

311. *Id.* § 50711(a)(2), 132 Stat. at 238 (codified as amended at 42 U.S.C. § 671(e)(6)(A)(i)).

312. *Id.*

313. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., TECHNICAL BULLETIN NO. 1: TITLE IV-E PREVENTION PROGRAM DATA ELEMENTS 2, 9 (2019), https://perma.cc/V2ES-RPL7.

314. Pub. Act No. 98-830, § 5, 2014 Ill. Laws 3922 (codified at 20 ILL. COMP. STAT. 505/21 (2019)).

315. *Id.* § 5, 2014 Ill. Laws at 3925 (codified at 20 ILL. COMP. STAT. 505/21(f)).

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supervisory approval of the plan.[316] But the statute does not define what those rights are, nor does it establish any procedures for resolving disagreements about any safety plan provisions or the length a plan would be in place, nor does it put any substantive limitations on safety plan contents, require consultation with agency attorneys, or provide attorneys for parents or children. As Diane Redleaf described these changes, they did not provide "much comfort to the parents who were still coerced into accepting safety plan separations."[317] They codified the practice without regulating it.

Florida similarly enacted legislation in 2014 that codified hidden foster care without regulating it much.[318] The legislature required CPS investigators to use safety plans when identifying a danger to a child and explicitly permitted safety plans to be "in-home" or "out-of-home."[319] The legislation includes neither any limits on safety plan contents nor any procedural limitations close to those proposed in Part VI.A.[320]

Somewhat more frequent than statutes are CPS agency policies, and occasionally regulations, that address safety plans that change children's custody.[321] These policies have increased in number in recent years, institutionalizing the hidden foster care practice.[322] Despite their number, these policies do not impose much regulation. Some states describe "out-of-home" safety plans in their policies, but without imposing limits on the time such out-of-home plans may be in effect or providing clear rules on what conditions require such plans to end.[323] Others limit the duration of safety

316. *Id.*

317. REDLEAF, *supra* note 7, at 190.

318. Act of June 23, 2014, ch. 224, § 8, 2014 Fla. Laws 2981, 2998-3003 (codified as amended at FLA. STAT. § 39.301(9), (14) (2019)).

319. *Id.* § 8, 2014 Fla. Laws at 2999-3001 (codified as amended at FLA. STAT. § 39.301(9)(a)(6)).

320. Implementing regulations direct that CPS investigators "must develop an out-of-home safety plan" when they determine that the child cannot remain safely at home. FLA. ADMIN. CODE ANN. r. 65C-29.003(3)(a)(1) (2019). Florida regulations do require supervisory review within twenty-four hours of a safety plan, but require no agency lawyer review or any other due process checks. *See id.* r. 65C-29.003(3)(c).

321. Ryan Shellady has helpfully catalogued these policies and regulations. *See* Shellady, *supra* note 14, at 1634 n.130.

322. For instance, Georgia and South Carolina adopted their policies in 2015. GA. DIV. OF FAMILY & CHILDREN SERVS., CHILD WELFARE POLICY MANUAL § 5.6, at 1 (2015), https://perma.cc/77C5-ZSDT; S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02. Texas adopted its policy in 2018. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., PARENTAL CHILD SAFETY PLACEMENT (PCSP) RESOURCE GUIDE 1 (2018), https://perma.cc/SXZ2-2AQ6.

323. *E.g.*, ADMIN. OFFICE OF THE COURT, SUPREME COURT OF IDAHO, IDAHO CHILD PROTECTION MANUAL 18-20 (5th ed. 2018), https://perma.cc/2CEX-VC94; VA. DEP'T OF SOC. SERVS., CHILD PROTECTIVE SERVICES: A GUIDE TO INVESTIGATIVE PROCEDURES (2019), https://perma.cc/5L63-RES8.

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plans—usually to one to three months.[324] Others require reviews by agency staff or other ongoing agency monitoring of safety plans, but no external checks and balances or even internal legal reviews.[325] Agency policies that require court oversight when physical custody changes are the outliers.[326]

A central feature of this state-by-state policymaking is that it is mostly just that—policymaking, not lawmaking. CPS agencies write the policies that they want and may adjust them as they desire. With the exceptions noted above, state safety plan policies lack legislative approval, or the comparative difficulties of amending statutes. Similarly, because they are policies and not regulations, CPS agencies have adopted them without notice-and-comment rulemaking or any other checks provided through administrative law.[327]

Moreover, agencies' compliance with their own policies can be lacking—especially in hidden foster care, which does not involve court oversight. Indeed, there is evidence that CPS agencies frequently violate their own policies. In Illinois, the Family Defense Center (with law firm assistance) documented CPS agencies' violations of their own policies requiring regular reviews of safety plan terms, notice to parents of the factual basis for insisting upon a safety plan, and meaningful consideration of parental requests to terminate or amend safety plans.[328] In South Carolina, litigation has alleged that a safety plan remained in effect for far longer than the ninety days permitted by CPS agency policy.[329]

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324. *E.g.*, ALA. ADMIN. CODE r. 660-5-34.06(3)(a)(2) (2019) (90 days); GA. DIV. OF FAMILY & CHILDREN SERVS., *supra* note 322, § 5.6, at 1 (45 days); ME. OFFICE OF CHILD & FAMILY SERVS., CHILD AND FAMILY SERVICES POLICY § IV.D(VI)(A)(C)(6) (2018), https://perma.cc/4ZUQ-UKZ6 (30 days); MONT. DEP'T OF PUB. HEALTH & HUMAN SERVS., CHILD AND FAMILY SERVICES POLICY MANUAL § 202-3, at 11 (2015), https://perma.cc/964Y-52JA (30 days); S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02 (90 days); TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 322, at 1 (60 days "in most instances"); VT. DEP'T FOR CHILDREN & FAMILIES, FAMILY SERVICES POLICY MANUAL ch. 52, at 8 (2019), https://perma.cc/Y5NU-JBQ9 (one month).

325. *E.g.*, ARIZ. DEP'T OF CHILD SAFETY, POLICY AND PROCEDURE MANUAL ch. 2, § 7 (2019), https://perma.cc/3LRY-H76K; GA. DIV. OF FAMILY & CHILDREN SERVS., *supra* note 322, § 5.6, at 3-4; OHIO ADMIN. CODE 5101:2-37-02(J) (2019); OR. DEP'T OF HUMAN SERVS., DHS CHILD WELFARE PROCEDURE MANUAL ch. 4, § 4, at 486 (2020), https://perma.cc/4WW3-M2J9 (requiring review every 30 days).

326. I have identified only one state that so requires. *See* ALASKA OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES MANUAL § 2.2.5.1(F)(1)(c) (2019), https://perma.cc/WJ7S-KSUT.

327. Shellady, *supra* note 14, at 1636-37. *But see id.* at 1636 n.137 (noting Louisiana as an outlier for having its safety plan framework codified by statute).

328. *See* FAMILY DEF. CTR., UNDERSTANDING AND RESPONDING TO DEPARTMENT OF CHILDREN & FAMILY SERVICES' ABUSE AND NEGLECT INVESTIGATIONS IN ILLINOIS: A BASIC GUIDE FOR ILLINOIS PARENTS AND OTHER CAREGIVERS 48-50, app. B (2016), https://perma.cc/PQ44-WBEP; Shellady, *supra* note 14, at 1626-27.

329. Complaint, *supra* note 66, ¶ 13.

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VI. Legally Domesticating Safety Plans and Hidden Foster Care

Many advocates have called for greater regulation of hidden foster care—some with the primary goal of requiring CPS agencies to work more effectively with and provide more supports to kinship caregivers,[330] others focused on protecting parents' and children's rights to family integrity.[331] Both are important goals, and greater regulation is necessary not only to ensure kinship caregivers get necessary support, but also to ensure that children's custody changes only when legally warranted and that the process leading to such decisions gathers the essential evidence and takes into account all related perspectives.

This Article's call for regulation requires two prefatory comments. First, regulation rather than prohibition of hidden foster care is necessary because informal and truly voluntary changes in custody are sometimes appropriate actions, as described in Part III.A. Second, while this Part is largely focused on legislative and executive branch regulation, court-imposed reforms through litigation remain worth pursuing. Courts can declare that procedures leading to hidden foster care are unduly coercive and could even order certain reforms to meet minimal standards of due process—such as a requirement that parents be able to challenge agency actions in hidden foster care cases, as discussed in Part VI.A.5.

This Part will focus on legislative and executive regulation because the litigation history discussed in Part II reveals significant limitations in courts' willingness or ability to regulate this practice fully. Several circuits have ruled that there is no due process issue at all.[332] Moreover, no matter how the circuit split regarding the due process implications described in Part II is resolved, legislative and administrative action is necessary. Even if courts universally held that hidden foster care violates the constitutional right to family integrity without due process, courts are unlikely to replace existing practice or to prohibit the use of any safety plans.[333] Rather, courts that find safety plans to violate parents' due process rights indicate that these state actions trigger the need for some procedural protections—but do not specify what those protections are.[334] These courts suggest that, institutionally, they want to defer to other

330. *See, e.g.*, Wallace & Lee, *supra* note 45, at 425 (arguing for services to "diverted kinship families").

331. *See, e.g.*, REDLEAF, *supra* note 7, at 37-50 (critiquing *Dupuy*); Pearson, *supra* note 14, at 836 (criticizing safety plans as unduly limiting family integrity without adequate procedures); Shellady, *supra* note 14, at 1627-34 (criticizing *Dupuy*); Simon, *supra* note 196, at 348.

332. *See supra* Part II.A.

333. *See supra* Part II.B.3. Others have concluded that legislative reforms are needed. *See, e.g.*, Pearson, *supra* note 14, at 837.

334. *See supra* text accompanying notes 168-69.

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branches of government to define the precise structure of procedural reforms. And even if courts were to impose their own reforms, courts could only order reforms necessary to meet constitutional minimums, leaving out several important reforms that could be achieved through legislative or executive action.[335] Accordingly, this Article advocates that hidden foster care be hidden no longer and that the practice be legally domesticated[336]—regulated to ensure accurate and voluntary decisionmaking, fair procedures, and individual case and systemic oversight.

To that end, this Part proposes a set of protections for individual cases, as well as a set of federal child welfare law reforms designed to bring hidden foster care cases under the umbrella of federal data tracking and oversight. Both sets of recommendations recognize that kinship diversion is a practice that will continue and that the practice involves a severe enough exercise of state power—involving important rights of multiple people—to warrant strong regulation.

A. Procedural Protections and Substantive Limits

Congress, state legislatures, the federal Children's Bureau, and state CPS agencies should enact a set of procedural protections and substantive limits to follow in each individual case to ensure CPS agencies effectuate changes in custody only when necessary, and to mitigate the concerns outlined in Part III.B. These protections should be enacted by legislatures or, at a minimum, promulgated as agency regulations to alleviate the challenge of an agency regulating itself via its internal policies.[337]

These procedural reforms would impose costs on state child protection systems—costs of lawyers for parents, costs of court hearings when sought by parents, and costs of additional staff. CPS agencies are sensitive to these costs and have invoked them when pressured to provide more procedural protections for families in hidden foster care.[338] These costs are well worth incurring. As the Supreme Court said in an early due process case involving the child protection system, "the Constitution recognizes higher values than speed and efficiency," and constitutional protections serve to protect individuals "from

335. The most significant reform that would likely be beyond the present state of federal constitutional law is the right to counsel proposed in Part VI.A.1. The Supreme Court has ruled that the Constitution does not guarantee parents facing a termination of parental rights the right to counsel. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981). So it is unlikely that the Court would hold that due process requires the provision of counsel to parents facing a choice whether to agree to a safety plan.

336. *See supra* note 8.

337. *See supra* text accompanying note 327.

338. *See, e.g.*, *supra* text accompanying note 286.

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the overbearing concern for efficiency" that can drive government agencies.[339] Moreover, these procedural costs are essential to addressing the policy concerns discussed in Part III.B. Nonetheless, addressing those concerns within real-world budgetary and political constraints is important for any achievable reform agenda, so this Subpart will also address both how states can use federal financial assistance to pay for one of these proposed reforms (prepetition counsel for parents) and how the proposed reforms moderate additional costs.

1. Appoint attorneys for parents subject to possible safety plans

Hidden foster care is hidden from court oversight, meaning it is also generally hidden from lawyers for individuals affected by CPS agency action, who are typically appointed only once formal court proceedings begin. Providing lawyers for parents in such cases is a crucial means to impose a meaningful check on these assertions of CPS agency authority. This Subpart will explain the importance of providing these lawyers and detail a recent change in federal funding policy that can help states pay for them.

Whenever CPS agencies ask parents to agree to change the physical custody of their child, they should provide an appointed attorney for the parent.[340] As the Seventh Circuit explained in *Dupuy*, a justification for safety plans is that they are like criminal plea bargains or civil settlements.[341] As discussed above, safety plans differ in several key ways from plea bargains and civil settlements—especially in the absence of attorneys for parents.[342] Providing attorneys to parents can help make bargaining situations much more fair. After all, an agency and a parent negotiate "in the shadow of the law,"[343] so having a lawyer advise a parent as to their rights and the agency's rights under the law provides essential information about the law's shadow.[344]

339. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

340. Time pressures could affect how such attorneys could interact with their clients. CPS agencies could reasonably impose safety plans on parents that last for no more than twenty-four or forty-eight hours, until an attorney could consult with the parents and then negotiate a somewhat longer-lasting safety plan with the agency.

341. *Supra* note 123 and accompanying text.

342. *See supra* notes 124-33 and accompanying text. As noted above, the presence of counsel is less frequent in some civil cases. *See supra* note 127. It is, however, the norm in formal foster care cases. *See supra* note 204 and accompanying text.

343. *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (discussing this phenomenon in the context of divorce negotiations).

344. *See* Gottlieb v. County of Orange, 84 F.3d 511, 522 (2d Cir. 1996) (noting parents' consultation with an attorney as an important factor in procedural due process analysis); *see also* Garlinghouse & Trowbridge, *supra* note 46, at 117 ("[A]dvice of counsel as to likely outcomes and rights regarding voluntary participation can be helpful.").

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Providing lawyers at this stage would expand existing statutory rights to counsel, which are typically triggered by the initiation of court proceedings.[345] A central point of this Article is that state CPS agencies engage in critical intervention in families without ever initiating court proceedings. That level of intervention outside of court justifies providing counsel to parents.

Lawyers are essential for helping parents navigate safety plan negotiations—perhaps more so than any of this Article's other recommendations—because legal analysis is required to understand parents' leverage in these negotiations. Parents' leverage will depend on several factors, including: first, the substantive legal standards, especially whether the CPS agency is justified in declaring a child abused or neglected, and, even if so, whether an emergency or pretrial removal is legally justified;[346] second, the state's burden to prove abuse or neglect to a family court;[347] third, application of the state's obligation to prove that it made reasonable efforts to prevent removal;[348] and, fourth, whether the particular facts rise to abuse or neglect under the state's statute or the related question whether the state can prove such facts through admissible evidence at trial. Exercising a parent's leverage requires a lawyer to understand the case and advise the parent accordingly. Otherwise, the agency has a tremendous information advantage—they are repeat players negotiating with parents who, in the aggregate, are of a low socioeconomic status and likely do not understand the nuances of child protection law, but certainly understand that the agency is threatening their relationships with their children.

Lawyers for parents can help craft safety plans that address each family's individual needs more effectively. Indeed, the Children's Bureau has concluded that legal representation enhances the parties' engagement in case planning and leads to more individualized case plans.[349] Similar improvements to the quality of safety plans should be expected—including more accurate determinations regarding both the need for a safety plan at all and specific safety plan provisions.

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345. *See, e.g.*, D.C. CODE § 16-2304(b)(1) (2019) (triggering appointment of counsel for parents of children named in court petitions); S.C. CODE ANN. § 63-7-1620(3) (2019) (providing a right to counsel to parents "subject to any judicial proceeding"). Katherine Pearson proposes informing parents of their right to consult with counsel if a case proceeded to court. Pearson, *supra* note 14, at 873. But establishing a clear right to counsel before agreeing to a safety plan would broaden existing right to counsel statutes.

346. These standards may also vary by jurisdiction. *See* Simon, *supra* note 196, at 368-75 (categorizing state removal statutes).

347. This burden also varies by state. Provencher et al., *supra* note 146, at 27.

348. *See* 42 U.S.C. § 671(a)(15)(B)(i) (2018).

349. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. ACYF-CB-IM-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 2 (2017), https://perma.cc/3TLU-G8JK.

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Providing parents with attorneys could lead CPS agencies to catch some of their own errors. Some kind of internal review by agency lawyers is commonplace before bringing a case to court, but is often lacking in hidden foster care cases.[350] Providing lawyers to parents in these cases should trigger the involvement of CPS agency lawyers as well, and thus provide appropriate counseling to agency caseworkers (including advising caseworkers when they lack legal authority to remove children and thus lack leverage to insist upon a safety plan).

This call for parent representation also finds some empirical support. Emerging evidence from two quasi-experimental studies demonstrates parents' attorneys from model parent representation offices generally help achieve positive outcomes for their clients *and* the system—accelerating the time to reunify children with parents and finalize guardianships, reducing length of stays in foster care, and doing so without compromising safety.[351] Children were reunified with parents significantly faster when their parents had attorneys from model parent representation offices.[352] Importantly, this increased speed of reunification did not leave children in any greater safety risk, as measured by the frequency of documented repeat maltreatment.[353] That finding suggests parent representation is not likely to jeopardize the safety of children subject to safety plans. Of course, state CPS agencies would be free to bring cases to family court if they could prove that a parent had abused or neglected a child and that foster care was necessary. In addition, both studies found that speed to reach other forms of permanency—guardianships and adoptions in the Washington study,[354] and guardianships in the New York study[355]—increased through model parent representation. That finding suggests parents' lawyers do negotiate permanent custody arrangements that involve their clients losing custody of their children. A reasonable extrapolation is

350. At least one state requires review by agency lawyers before bringing a case to court by policy. *See supra* text accompanying note 200. More broadly, the American Bar Association considers a lawyer's involvement in "prepar[ing] the initial petition" a "basic obligation[]" of lawyers representing CPS agencies. AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES 4 (2004) (capitalization altered), https://perma.cc/GR5Z-6TCE; *see also id.* at 7 ("The agency attorney should work with the agency to bring only appropriate cases to court.").

351. *See* Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILD. & YOUTH SERVICES REV. 1337, 1338, 1340-42 (2012); Gerber et al., *supra* note 130, at 52. Other studies have found similar benefits but have various limitations. *See* Gerber et al., *supra* note 130, at 44 tbl.1.

352. Courtney & Hook, *supra* note 351, at 1338, 1340-42; Gerber et al., *supra* note 130, at 43, 52.

353. Gerber et al., *supra* note 130, at 51-52.

354. Courtney & Hook, *supra* note 351, at 1340-42.

355. Gerber et al., *supra* note 130, at 52.

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that parent attorneys would negotiate reasonable safety plan conditions in appropriate cases.[356]

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The Children's Bureau expanded Title IV-E funding eligibility in January 2019 to include legal representation for parents.[357] Title IV-E authorizes the Children's Bureau to reimburse states for half of the expenditures "found necessary by the Secretary . . . for the proper and efficient administration of the State plan."[358] Through the January 2019 guidance, the Children's Bureau determined that providing "independent legal representation by an attorney" for both children and parents qualifies under this standard.[359] This federal funding is available both when children are in CPS agency custody and subject to an open family court case *and* when the child is a "candidate for title IV-E foster care."[360] The statute defines a foster care "candidate" as including someone "at imminent risk of entering foster care" but "who can remain safely in the child's home *or in a kinship placement*" with some kind of prevention services.[361] A child subject to safety plans seems to fit easily in the statutory definition of a foster care "candidate." Thus, the new Children's Bureau guidance establishes that federal funds may support the provision of counsel to the parents of these children.

This reform opens the door to significant increases in funding for parent and child representation—estimated to be in the hundreds of millions of dollars[362]—and thus could pay much of the cost to provide counsel in safety plan cases when that reform was not possible in prior years. The new federal funding will cover 50% of the cost of counsel in eligible cases.[363] Roughly half of cases are Title IV-E eligible,[364] so this new funding would cover about 25% of the total cost. However, that percentage applies not only to an *expanded*

356. These extrapolations from existing data should, of course, be subject to evaluation; states should create prepetition parent representation so such evaluations may occur.

357. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE POLICY MANUAL § 8.1B(30) (2020), https://perma.cc/AV9D-W6B4.

358. 42 U.S.C. § 674(a)(3) (2018). Legal representation for parents falls into the catch-all category of such costs, for which the statute sets a 50% reimbursement rate. *Id.* § 674(a)(3)(E).

359. CHILDREN'S BUREAU, *supra* note 357, § 8.1B(30).

360. *Id.*

361. 42 U.S.C. § 675(13) (emphasis added).

362. *See* John Kelly, *Trump Administration Rule Change Could Unleash Hundreds of Millions in Federal Funds to Defend Rights of Parents, Children in Child Protection Cases*, CHRON. SOC. CHANGE (Feb. 5, 2019), https://perma.cc/2225-JE78.

363. CHILDREN'S BUREAU, *supra* note 357, § 8.1B(30).

364. CHILD TRENDS, TITLE IV-E SPENDING BY CHILD WELFARE AGENCIES 4 (2018), https://perma.cc/62WM-J2VG.

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provision of counsel—that is, in safety plan cases without a petition—but to all provision of counsel. Previously, states had to pay the full cost of providing appointed counsel, but now they can receive a federal reimbursement of a significant percentage of that total amount—which should be sufficient to provide counsel in prepetition cases.

2. Provide parents notice of the factual basis for a change in custody

Some amount of notice appropriate to the circumstances of a case is "no doubt" a required part of due process.[365] In safety plan cases in which CPS agencies insist on any form of a change in custody, the agency should provide the parent with specific written notice of the factual basis for that insistence.[366] Even cases like *Dupuy*, where the court held safety plans to be voluntary, recognize that voluntariness depends on the legitimacy of the CPS agency's insistence on that separation.[367] Providing notice forces CPS agencies to write down their justification and enables parents (ideally with their lawyers, as described below) to evaluate the legal strength of that insistence and determine whether to contest or agree to it.

3. Set a maximum length of time for safety plans

No safety plan should change a child's physical custody indefinitely. To the contrary, a relatively brief maximum length of time should govern such safety plans, after which either the safety plan ceases to be in effect and the child must be able to reunify or courts must become involved.[368] If a case cannot be resolved in that time frame—for instance, if a parent's need for rehabilitation is so severe that he or she cannot regain custody—the case warrants court oversight. A maximum timeline also creates deadline pressure for the agency to help a parent reunify (and for the parent to cooperate with those efforts) to avoid the cost and uncertainty of court proceedings.

The Family First Act, discussed in Part V.A.2, implies the need for time limits. The Family First Act provides funding flexibility to provide services "for not more than a 12-month period."[369] Some state policies provide even shorter timelines, such as ninety days.[370]

365. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

366. Shellady, *supra* note 14, at 1644-45.

367. *Supra* notes 119-22 and accompanying text.

368. Several states have recognized this point. *See supra* note 324 and accompanying text. Other critics have recommended such rules without specifying a precise limit. *E.g.*, Pearson, *supra* note 14, at 873.

369. 42 U.S.C. § 671(e)(1)(A)-(B) (2018).

370. *E.g.*, S.C. DEP'T OF SOC. SERVS., *supra* note 30, § 719.02.

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Maximum time limits should be quite brief—no longer than thirty days. Many formal foster care cases are resolved faster than that.[371] Longer time periods—like the twelve months permitted under the Families First Act—make sense for provision of services to a family that remains intact. But when CPS agencies effectuate a breakup of the family, even a temporary one, twelve months is far too long.[372] If separations of parents and children longer than thirty days are truly necessary, this suggests a need for court oversight because the parent poses a more significant danger to the child or needs a more intensive set of rehabilitative services before reunification is safe. If either is the case, then family court checks and balances and oversight are particularly important for all the reasons explained in Part III.B.

In addition, statutes or regulations should make clear that once a maximum timeline expires, absent court rulings to the contrary, a parent has the right to regain physical custody of their child without negative repercussions. Such statements are necessary given the existence of cases in which safety plans are extended indefinitely, even past state agency policy guidelines.[373]

4. Include an exit strategy

Formal foster care triggers state obligations to develop detailed and individualized case plans and to make reasonable efforts to prevent the need for removal and reunify parents and children, and hidden foster care avoids those requirements.[374] A reasonably short time limit avoids many of the concerns with the loss of those requirements; either families will reunify or

371. Sankaran & Church, *supra* note 194, at 216-17.

372. Some states have voluntary foster care statutes that have longer timelines than suggested in this Article. *E.g.*, CAL. WELF. & INST. CODE § 16507.3(a) (West 2019) (providing a default limit of 180 days on placements, with the possibility of extension). Voluntary foster care cases impose on the CPS agency obligations equivalent to those in formal foster care cases. *See, e.g.*, *id.* § 16507.5 (requiring local CPS agencies to "make any and all reasonable and necessary provisions for the care, supervision, custody, conduct, maintenance, and support of the minor"); CHILDREN'S BUREAU, *supra* note 357, § 8.3A.13(5), https://perma.cc/U25R-2HRJ (requiring the CPS agency to take "placement and care responsibility for the child"). This Article's conclusion is that parents should have counsel, notice, and access to court oversight in those cases. Federal funding law suggests that court oversight is available; when parents seek to terminate a voluntary placement agreement, such agreements "shall be deemed to be revoked unless the State agency . . . obtains a judicial determination" that the child must remain in state custody, 42 U.S.C. § 672(g). A state that has existing law for such formal voluntary foster care placements could use that as a template for regulation of hidden foster care cases, and the Children's Bureau could cite that option as one means to provide adequate due process protections. Because not every state has or uses such statutes, this Article does not further address them.

373. *E.g.*, *supra* text accompanying note 66.

374. *See supra* Part IV.B.

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CPS agencies will have to go to court and thus trigger those requirements. Nonetheless, plans should be clear regarding what would enable parents and children to reunify, especially when that could be possible fairly quickly. This proposal recognizes that a maximum time limit is just that, and that a change in a child's custody should last no longer than necessary given the individual needs of a case. The length in a specific case should be subject to case-by-case negotiation and renegotiation as the case develops. Perhaps a restraining order against or arrest of a parent's partner who had abused the child, medical or mental health treatment that stabilizes a parent after an acute crisis, or new housing would suffice. When that is the case, it should be spelled out in safety plans so that when parents meet those conditions they can insist upon reunification.[375]

5. Permit parents to seek court review of safety plans

Much room exists for reasonable debate regarding the contents of individual safety plans—CPS agencies and parents could reasonably disagree on whether abuse or neglect has occurred, whether a change in physical custody is necessary, whether one or both parents or adults in a home need to be separated from children, what level of supervision of a parent's contact with children is required, or what is necessary before parents and children can reunify. Parents should be allowed to challenge such safety plan provisions without risking foster care and an abuse or neglect petition against them.

Absent any provision to trigger court oversight during a safety plan, parents must either abide by CPS agency safety plan demands or face tremendous risks—and parents rarely choose the latter.[376] Providing a mechanism for parents to challenge a safety plan in court without triggering an abuse or neglect petition or removal would create a more meaningful check on CPS agency authority while respecting the occasional benefits of safety plans. Parents should be able to insist on a court hearing to review a safety plan under the same standards that govern pre-adjudication removals, and under the same timeline—usually forty-eight or seventy-two hours—provided to review emergency removals because those are the most closely analogous actions.[377]

375. Spelling out such conditions would also aid decisionmaking in closer cases when parents claim that they have substantially complied with conditions or have met as many conditions as ought to be necessary.

376. Indeed, *Dupuy* made no reference to even a single parent rejecting a CPS agency request to agree to a safety plan, Dupuy v. Samuels, 465 F.3d 757 (7th Cir. 2006), and an attorney for the plaintiffs has asserted that the full trial record revealed no such parent, REDLEAF, *supra* note 7, at 44-45.

377. Other critics of safety plans have made similar recommendations. *See, e.g.*, Pearson, *supra* note 14, at 873; Shellady, *supra* note 14, at 1646-47.

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Parents should be able to trigger this provision at any point. Consider, for instance, a case of suspected physical abuse. The evidence early in a case might raise probable cause of abuse justifying an emergency removal, and a parent might therefore agree to a safety plan to avoid going to court, even if the parent insists that they did not abuse their child.[378] But additional medical evidence might raise doubts about the abuse allegations,[379] and the parent could then request the termination of the safety plan. If the agency does not agree, the parent should be able to press their case in court, rather than be bound by their earlier decision made with less information.

These reviews would impose only minimal procedural costs. They would involve single hearings reviewing a safety plan—unlike a formal foster care case, which may involve a full trial and a series of review hearings for an indeterminate period of time.[380] Moreover, they would be triggered only by parents who feel aggrieved by a safety plan decision; cases in which families decide that safety plans present the best option,[381] and involve a more genuine agreement with families, need not trigger court reviews.

B. Applying the Federal Regulatory Apparatus

The federal government plays an essential role in the operation of and policy debates within the modern child protection system. While the federal child welfare legal architecture now implicitly recognizes the hidden foster care system through the steps discussed in Part V.A, it has not brought the practice within the federal child protection regulatory system. That is a central reason why the practice remains hidden—basic data is not gathered or reported, federal requirements do not regulate the practice, and federal reviews of state performance do not evaluate state use of the practice. This Article calls on Congress and the federal Children's Bureau to bring hidden foster care within the federal child protection regulatory system, and this Subpart discusses three central elements for such federal regulation.

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378. *See, e.g.*, Gottlieb v. County of Orange, 84 F.3d 511, 522 (2d Cir. 1996) ("[F]rom the departing parent's standpoint, judicial review may not be the preferred method of resolving the matter, for the statutory procedures envision a hearing within three days, and the evidence or allegations may be such that the parent believes the matter likely cannot be adjudicated quickly.").

379. *See, e.g.*, *In re* Juvenile Appeal, 455 A.2d 1313, 1317, 1321 (Conn. 1983) (describing medical evidence that eventually exonerated the parents after a child's unexplained death).

380. Federal funding law spells out requirements for regular reviews for children in formal foster care. *See* 42 U.S.C. § 675(5) (2018).

381. *See supra* Part III.A.

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1. Data gathering

States gather and report key data as a condition of receiving federal funding. This data then informs policy discussions. If the data is not gathered or reported, important policy discussions either do not happen or happen without adequate information.[382] As discussed above, there is a dearth of hard data about states' use of hidden foster care, and this is a key reason hidden foster care is hidden.[383] An essential step is for the federal government to require state CPS agencies to report the number of cases in which they effectuate a change in physical custody through safety plans, the duration of such changes in custody, safety outcomes for affected children, and how such cases are resolved (that is, by reunification with the parent with whom the child lived prior to the safety plan, by permanent custody with the alternative caregiver, by the state opening a family court case, or by some other means).[384]

Such data reporting is important everywhere and is especially important in states using flexible federal funding pursuant to the Family First Act, lest removals via safety plans become a way for states to use federal dollars to prevent foster care without preventing children's removals. Congress should amend the Family First Act's data reporting requirements to require reporting on the number of foster care candidates for whom CPS agencies prevent a parent-child separation, not only those who CPS agencies keep out of foster care.[385]

Even without congressional action, provisions within the Family First Act could provide the basis for important data tracking. States using flexible funding under the Act must provide data regarding children's placement status at the start and end of a one-year period in which the state provides some mental health or caregiving support service.[386] States must also identify individual strategies used to prevent foster care.[387] The Children's Bureau should read these two provisions together to require states to report detailed data on when they use changes in physical custody to prevent foster care and

382. *See* Shellady, *supra* note 14, at 1648 (arguing for better data gathering to inform policy discussions).

383. *See supra* Part I.B.

384. Such data is currently excluded from federal data reporting requirements. *See supra* notes 73-74 and accompanying text. Some states require it to be collected, minimizing the administrative burden of a new reporting requirement. *See, e.g.*, ARIZ. DEP'T OF CHILD SAFETY, *supra* note 325, ch. 2, § 7. Safety outcomes include whether the child was the subject of further child protection hotline reports and whether any such reports were substantiated by child protection agencies.

385. *Cf. supra* text accompanying note 311 (noting the existing provision of the Family First Act focusing on preventing foster care placements).

386. 42 U.S.C. § 671(e)(4)(E)(iii) (2018).

387. *Id.* § 671(e)(4)(A)(i), (e)(4)(E)(i).

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what happens to children, parents, and kinship caregivers in those cases. Unfortunately, existing administrative guidance from the Children's Bureau does not require states to report when they effectuate a change in physical custody to hidden foster care;[388] the Bureau should revisit that issue.

Requiring greater data reporting would resolve one of the oddities of the present child protection data reporting regime: States need not report what happens with the majority of children who CPS agencies deem to be abused or neglected. CPS agencies report that they take into formal foster care only 23.7% of children deemed victims of abuse or neglect.[389] That percentage varies significantly from state to state—from a low of 3.9% to a high of 53.1%.[390] What happens to the more than 500,000 children[391] deemed victims who are not brought into formal foster care by CPS agencies? Federally required data cannot say. This Article projects that a large portion of these children—from the high tens to the low hundreds of thousands—end up in hidden foster care.[392] And what happens to those children? For instance, how many reunify with parents (and after how long), how many stay with kinship caregivers permanently, and how many eventually enter foster care? Federally required data cannot say, and some CPS agencies even admit they do not know.[393] Requiring states to report all uses of hidden foster care would go a long way toward providing important insights into a large population of children.[394]

2. Child and Family Services Reviews

The Children's Bureau should regulate CPS agencies' use of kinship diversion through its Children and Family Services Reviews. CPS agencies are already subject to these federal reviews of their work in cases involving

388. *Supra* text accompanying note 313.

389. CHILDREN'S BUREAU, *supra* note 75, at 81, 90 tbl.6-4.

390. *See id.* at 90 tbl.6-4.

391. CPS agencies identified roughly 674,000 children as abuse or neglect victims in 2017. *Id.* at 20. If 76.3% were not removed, *id.* at 81, that amounts to 514,262 children.

392. *See supra* Part I.B.

393. The *Virginia Mercury* quoted the director of the Division of Family Services within the Virginia Department of Social Services as follows:

> If you're asking me, at the state, what's occurring with that diversion practice—how is that happening, how is it occurring, which families are getting services, which are not, how quickly are the kids going back to the family[,] . . . what are the outcomes, do they ultimately stay with that family, that sort of thing, I can't answer those questions for you.

O'Connor, *supra* note 89; *see also* VA. DEP'T OF SOC. SERVS., *supra* note 89, at 4 ("However, once diverted, the case is often closed and no additional tracking of the child occurs.").

394. The federal government could go even broader and require more detailed reporting about what happens to children deemed victims but not removed by CPS agencies, including those who remain at home subject to CPS agency oversight of some kind. While such a step would be beneficial, it is beyond the scope of this Article.

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removals to formal foster care, court petitions, and expenditures related to certain abuse and neglect prevention grants.[395] These reviews have become a primary means of the federal government's oversight of the quality of state child protection systems.[396] The Children's Bureau should evaluate the use of hidden foster care to ensure CPS agencies use it only when necessary and consistent with procedural requirements outlined above.

Indeed, federal regulations already provide a basis for evaluating hidden foster care cases—the Children's Bureau evaluates states on how well they balance children's need for safety with the goal that "[c]hildren are safely maintained in their own homes whenever possible and appropriate."[397] Notably, the regulation focuses on keeping children in their own homes—not merely keeping them out of foster care. Thus, causing children to leave their own homes through safety plans should fall well within the Children's Bureau's mandate when performing Child and Family Services Reviews.

3. Family First Act funding reforms

The Family First Act wisely permits states to use federal funds to prevent the need to remove children from their parents rather than, as Title IV-E has historically done, simply to help states pay for foster care. As discussed in Part V.A, however, the Family First Act's references to kinship care risk paying states to use hidden foster care—and thus risk preventing foster care without preventing the *need* for removing children from their parents.

Congress should amend the Family First Act to ensure it is implemented consistently with the goal of preventing unnecessary parent-child separations and not merely preventing formal foster care placements. When CPS agencies effectuate a change in physical custody of a child, Congress should require them to use Family First Act funds to support reunification efforts—not merely services to support the new kinship placement. Congress should further insist that when state action causes physical custody changes, states must follow requirements like those discussed in Part VI.A as a condition of using Family First Act funds.

Even without congressional action, the Children's Bureau has authority to impose similar requirements. Crucially, federal funding via the Family First Act is discretionary—the Secretary of Health and Human Services "*may* make a

395. The Reviews, described in 45 C.F.R. §§ 1355.31-.34 (2019), apply to state CPS agencies' use of certain federal funds. *See id.* § 1355.31 (delineating the scope of the regulations).

396. *See* Sankaran & Church, *supra* note 194, at 234 (describing the Reviews' history, process, and function).

397. 45 C.F.R. § 1355.34(b)(1)(i)(A)-(B).

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payment to a State"[398]—compared with other provisions of Title IV-E that are mandatory.[399] Requirements reasonably related to the purpose of preventing "the trauma of unnecessary parent-child separation,"[400] as the Children's Bureau has put it, are thus relevant to how the Bureau exercises its discretionary funding authority. Other more specific provisions of the Family First Act also imply this authority. For each child, the state must "identify the foster care prevention strategy" it will use.[401] When that strategy is a change in physical custody, it is reasonable to expect states to explain why that strategy is necessary, and the Bureau may reasonably insist on some steps to ensure that identified prevention strategies are appropriate.[402]

Conclusion

Beyond the well-established foster care system operated by CPS agencies and supervised by family courts, most states operate hidden foster care systems—systems that make profound decisions without court involvement or oversight, or any meaningful checks and balances. The hidden foster care system changes custody of children (sometimes permanently), removes legal obligations for agencies to help reunify parents and children or supervise children to ensure their safety and well-being, and fails to provide kinship caregivers with supports comparable to those provided in formal foster care. This system is literally hidden in that existing data-tracking and reporting laws do not require states to count how frequently they use this system, let alone what happens to children who are in it. Despite the lack of data, it is clear the hidden foster care system is large—roughly on par in size with the number of children CPS agencies remove from their families and place in formal foster care every year. And the hidden foster care system intervenes in families analogously to the formal foster care system. This hidden system is likely growing and is certainly becoming institutionalized through federal funding

398. 42 U.S.C. § 671(e)(1) (2018) (emphasis added). The Children's Bureau sits within the Department of Health and Human Services, *id.* § 191, and administers federal child welfare funding, Children's Bureau, *What We Do*, U.S. DEP'T HEALTH & HUM. SERVICES, https://perma.cc/MK7U-LR8R (archived Feb. 12, 2012).

399. *E.g.*, 42 U.S.C. § 671(b) (providing that "[t]he Secretary *shall* approve any plan which complies with" the Title IV-E requirements in effect before the Family First Act (emphasis added)).

400. CHILDREN'S BUREAU, *supra* note 303, at 2.

401. 42 U.S.C. § 671(e)(4)(A)(i)(I).

402. The Bureau has required states to explain how a "prevention plan" will help the child live at home or with kin, temporarily or permanently, but has not yet issued details requiring states to explain why changing custody away from parents is necessary. *See* CHILDREN'S BUREAU, *supra* note 303, at 6.

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incentives, new federal funding that strengthens those incentives, and state policies that seek to codify the practice.

The legal defense to due process challenges—that these are voluntary placements—is unconvincing in light of the threats to remove children built into the practice. That conclusion alone requires consideration of meaningful procedures to protect children's and parents' fundamental constitutional right to family integrity. Even if this defense were convincing as a matter of constitutional due process, it would be unconvincing as a policy defense of the system. Taking the due process defense of hidden foster care on its own terms—terms that insist CPS agencies only make legally justifiable threats to remove children and that analogize development of safety plans to plea bargains and civil settlements—underscores the need for significant reforms. Checks and balances are required to ensure CPS threats are legally justified in the tens or hundreds of thousands of cases in which they occur and to make safety plan agreements truly voluntary.

It is thus time to legally domesticate the hidden foster care system though a mixture of state legislation and reform of federal funding and oversight systems.

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